OVERSIGHT OF THE ANTITRUST ENFORCEMENT AGENCIES

HEARING

BEFORE THE

SUBCOMMITTEE ON
REGULATORY REFORM,
COMMERCIAL AND ANTITRUST LAW

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

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OVERSIGHT OF THE ANTITRUST ENFORCEMENT AGENCIES

FRIDAY, MAY 15, 2015

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON REGULATORY REFORM,
COMMERCIAL AND ANTITRUST LAW
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to call, at 9:01 a.m., in room 2141, Rayburn House Office Building, the Honorable Tom Marino (Chairman of the Subcommittee) presiding.

Present: Representatives Marino, Goodlatte, Conyers, Farenthold, Issa, Trott, Johnson, DelBene, Jeffries, Cicilline, and Peters.

Staff Present: (Majority) Anthony Grossi, Counsel; Andrea Lindsey, Clerk; (Minority) Slade Bond, Counsel; and James Park, Counsel.

Mr. MARINO. Good morning.

The Subcommittee convenes this morning to hear from the Nation's two top antitrust enforcement officials regarding their ongoing efforts, as well as to discuss certain issues facing the agencies in the application of antitrust law.

I am going to recognize myself for a couple of minutes for an opening statement and then my good friend Ranking Member Mr. Johnson's opening statement.

In doing so, the Subcommittee continues its strong and vigilant oversight of the agencies under its jurisdiction. Continued oversight is one of the fundamental responsibilities of this Subcommittee and brings to light the checks and balances envisioned by our Founding Fathers.

The Federal Trade Commission, through its Bureau of Competition, and the Department of Justice, of which I had the honor of working there through its Antitrust Division, are charged with protecting the freedom of our markets from anticompetitive conduct and practices, thereby enhancing American consumer welfare.

To facilitate a free market, the agency should enforce the antitrust laws in a manner that is transparent, fair, predictable, and reasonably stable over time. This will allow businesses to innovate and grow with a firm understanding of what conduct runs afoul of the law and without the fear of capricious government intervention.

One of the areas that has drawn the scrutiny of the Judiciary Committee, sitting FTC Commissioner's antitrust law practitioners,

and academics is the FTC's authority under section 5 of the FTC Act, and I greatly respect the people and what they do at the FTC.

Specifically, there is a concern about the parameters of the FTC's enforcement authority. Many legal practitioners and members of the business community question what conduct qualifies as an "unfair method of competition" under section 5 of the FTC Act, but does not otherwise violate the Clayton or Sherman Acts.

Last Congress, FTC Chairwoman Ramirez testified that the FTC has used its stand-alone section 5 authority in limited circumstances and has provided appropriate guidance on when it will exercise such authority. Yet, it appears that much, if not all, of this guidance is contained in consent decrees reached with parties following an FTC administrative proceeding without any judicial review.

FTC Commissioner Wright recently announced that he has proposed several definition of the FTC's section 5 stand-alone authority for a vote within the Commission. I look forward to hearing whether the FTC has seriously reviewed any of Commissioner Wright's proposals.

Another area deserving a serious review concerns the different merger review process of two antitrust enforcement agencies. Last year, the Standard Merger and Acquisition Reviews Through Equal Rules Act, or the SMARTER Act, was introduced and reported favorably by the Judiciary Committee. The legislation permanently removes the disparities in the merger review process. It also ensures that companies face the same standards and processes regardless of whether the FTC or Justice Department reviews the merger.

While the FTC took a positive step this year by approving a rule that partially adopts one of the reforms contained in the SMARTER Act, the full set of changes to the merger review process should be made permanent. It should not remain subject to a Commission that has already demonstrated an ability to withdraw and reinstate rules over time.

The Committee also is concerned with the application of competition laws of foreign jurisdiction. And I'm looking forward to hearing your response on those. In particular, the Committee has received troubling reports of China's use of its antitrust laws to promote domestic industry at the expense of intellectual property rights and international business.

I look forward to discussing how our antitrust enforcement agencies are coordinating with other administrative agencies, departments, and their foreign counterparts to ensure that global antitrust policy promotes competition.

Today's hearing will allow for an open discussion on these and other issues with the aim of ensuring that the antitrust enforcement agencies are appropriately policing our free markets.

And please let me add we will be called to votes somewhere around 9:30. In consideration of our distinguished guests, I'm going to try to be very efficient.

And, with that, I now recognize my good friend from Georgia, Congressman Hank Johnson, and he is the Ranking Member of this Subcommittee.

Mr. Johnson.

Mr. JOHNSON. Thank you, Mr. Chairman.

I welcome this esteemed panel today. Chairwoman Edith Ramirez has distinguished herself in her short time as the chair of the Federal Trade Commission.

The Commission recently celebrated a century's commitment to its important mission to protect consumers on a variety of issues. One particular aspect of the Commission's mission that is near and dear to me is its focus on consumer privacy. In recent years, the Commission has demonstrated a keen interest in protecting against unfair privacy intrusions.

Additionally, it is my hope that the Commission's role in protecting consumers and holding corporations accountable for the promises they make grows and flourishes as part of making the Obama administration's vision for strong consumer privacy protection a reality following the White House privacy blueprint and big data report.

As the proud sponsor of the Application Privacy, Protection, and Security Act, or the APPS Act, I recognize that consumer privacy is one of the key issues of our time and will only grow more complicated as more consumers and devices are connected.

I would also note that, although we conceive privacy as primarily a consumer protection issue today, there is a growing consensus that big data and consumer privacy have implications on antitrust law and competition policy. On both sides of the Atlantic, there has been substantial focus on the role of big data as a barrier to market entry as well as calls to incorporate consumer privacy issues into traditional antitrust analysis.

Additionally, the Supreme Court has long held that Congress intended that the Sherman Act, the first major Federal antitrust statute, to be a consumer welfare prescription. Given the broad agreement among consumer advocates, the public, and stakeholders that user trust and privacy are central to user experience, it is clear that restraints on trade and competition that upset this experience in consumer preference are not consistent with the goals of antitrust law.

Assistant Attorney General Baer has also distinguished himself as a voice for consumers in his tenure as the Assistant Attorney General for the Antitrust Division. Through a history of strong enforcement of the antitrust laws, competition has flourished under his leadership, although work remains to be done.

Of particular interest to me is the Justice Department's role in enforcing private antitrust actions. In 2013, the Supreme Court wrongly decided in *American Express v. Italian Colors* that parties must arbitrate even where antitrust laws prohibit a party from using its monopoly power to force other parties to pay higher fees.

In a joint brief alongside the Solicitor General, the Justice Department's Antitrust Division argued for the United States that, "Private actions are an important supplement to the government's civil enforcement efforts under Federal competition laws, which the Department of Justice and the Federal Trade Commission have primary responsibility for administering," and concluded that, "the United States, therefore, has a substantial interest in ensuring that arbitration agreements are not used to prevent private parties

from obtaining redress for violations of their Federal statutory rights."

I wholly agree with this view. Although this issue arose just before Assistant Attorney General Baer's tenure, it is clear that opportunities remain for the Antitrust Division of the Justice Department to right this wrong.

For instance, as a condition for the merger agreements, the Justice Department may require merging parties to agree to condition the merger's approval on the parties' agreement to not require forced arbitration and claims, particularly in the antitrust context. This would, at least in some circumstances, curtail the impact of the rapid growth of forced arbitration clauses and forestall their negative impact on competition.

With that, I thank the Chairman for holding this hearing. And I yield back the balance of my time.

Mr. MARINO. Thank you, Mr. Johnson.

And just some housekeeping. Without objection, the Chair is authorized to declare recesses of the Committee at any time.

Now the Chair recognizes the Chairman of the full Judiciary Committee, Congressman Goodlatte, for his opening statement.

Mr. GOODLATTE. Thank you, Mr. Chairman.

The vigorous, intelligent, and predictable enforcement of antitrust law is critical to the American free market. By contributing to clear boundaries within which companies can compete, innovate, and grow, sound antitrust enforcement helps the American economy to flourish and American consumers to reap the competitive benefits of choice, quality, and reasonable prices.

Today's hearing will explore whether the antitrust enforcement agencies are administering the antitrust laws in a fashion that promotes a free market and encourages robust competition.

Last Congress, I led a letter to Chairwoman Ramirez expressing concerns with the lack of guidance on the Federal Trade Commission's section 5 stand-alone enforcement authority. As I explained then, the absence of clear guidance creates an enforcement environment that can deter innovation and economic creativity and is antithetical to the principles underlying our antitrust laws.

Over a year has passed and the FTC has not yet issued guidance and does not appear any closer to doing so. It is my hope that the Judiciary Committee will not need to take action beyond writing letters and holding hearings. I look forward to discussing this issue today in more detail with Chairwoman Ramirez and working together to ensure the marketplace has transparent and predictable rules within which to operate.

Another important reform that promotes the fair, consistent, and predictable enforcement of our antitrust laws is the Standard Merger and Acquisition Reviews Through Equal Rules Act, or the SMARTER Act. This legislation harmonizes the standards and processes that the antitrust enforcement agencies apply to merger reviews. I look forward to working with my colleagues in both the House and Senate to enact this important reform into law.

Finally, I understand that the Department of Justice and the FTC are undertaking separate antitrust inquiries into areas that may affect intellectual property issues. The FTC is in the midst of a nearly 2-year study of patent assertion entities, commonly re-

ferred to as "patent trolls." I look forward to hearing additional detail regarding the progress and substance of the inquiry, as well as when we can expect a final report on the study.

Additionally, the Department of Justice is in the process of reviewing the separate consent decrees that govern the two largest performing rights organizations, the American Society of Composers, Authors and Publishers, or ASCAP, and the Broadcast Music, Incorporated, BMI. I'm interested to learn about the status of this review, when it might conclude, and what potential revisions to the decrees are being considered.

I look forward to hearing the testimony today from our witnesses on the agencies' antitrust enforcement efforts in general as well as on these important issues.

Thank you, Chairman Marino, for continuing the Committee's long and robust oversight record by holding this Subcommittee hearing.

At this time I would like to yield to the gentleman from California, Mr. Issa, for his comments.

Mr. ISSA. Thank you for yielding, Mr. Chairman.

Today I will be entering into the record by unanimous consent the report of the Committee on Oversight and Government Reform dated January 2, entitled "Tiversa, Inc.: White Knight or Hi-Tech Protection Racket?"

Although it would be inappropriate to ask for specifics on this ongoing case, I will be dealing with the ramifications of that case.

And I would like to take a moment to thank both Mr. Baer and Ms. Ramirez for something that is unusual for me to do, and that is, in the case of Tiversa, only because of the Justice Department's determination that Rick Wallace was a credible witness was he granted immunity as a whistleblower so that he could testify before the administrative law judge in that case, which was the LabMD case.

In that case, he testified under oath that Tiversa had a pattern of deception that included, but not limited to, its falsifying information in the LabMD case. This calls into question the very system on which the FTC bases its section 5 authority, which is that most often, when they are going after a data breach, they are relying on the data breach to be authentic and as stated.

This is a complicated issue and one that I'm sure both the FTC and other agencies will be grappling with for a period of time. Many of my questions today will deal with section 5 authority and, in particular, in the case of a company such as Tiversa, who has shown to have scraped data from around the world on a regular basis, including and not limited to defense contractor information that involved Marine One's new diagram for their cockpit, additionally, AIDS patients' information in which those patients' information was then used by an attorney for Tiversa to mount a plaintiff's suit as a class-action suit against that free AIDS clinic. This has been verified by the Oversight Committee by factual data, including telephone records subpoenaed.

When we have an entity like that, is the Federal Trade Commission's primary responsibility to use section 5 authority to go after companies who have inadvertent breaches or should they be concentrating on the many companies who troll the Internet scraping

data or in some other way trying to make a living through high-tech hijack and extortion? That is a question that I believe can be answered most properly by: You must do both, but certainly cannot fail to focus on those who prowl the Internet, causing these breaches and often taking full advantage.

There are many good actors, many white knights. In the case of the investigation of Tiversa, we found that they were not a white knight. We found that the Federal Trade Commission, whether willingly or unwillingly, had been deceived. And today I want to thank both of our witnesses for their effort to bring that truth to the court.

And I thank the gentleman and yield back.

Mr. MARINO. Thank you.

The Chair now recognizes the Ranking Member of the full Judiciary Committee, Mr. Conyers.

Mr. CONYERS. Thank you, Mr. Chairman.

I will be brief. But the thrust of my opening statement deals with the fact that we have for too long ignored the fact that there ought to have been a much more vigorous antitrust action. I was concerned when we settled the American Airlines-US Airways merger. And I want to reflect that antitrust scrutiny of mergers have been woefully insufficient over the years.

And what we are doing is continuing a new strategy of examining, for example, 12 telecommunication mergers since 1997; the failure of the AOL-Time Warner merger; in the banking industry, 50 mergers since 2001. And so we've got a lot of cleaning up to do and a lot of reexamination of our strategies.

In that sense, we are very cautious and wary of efforts of some in our legislature to undermine some of the important authority that we have. The good news is that the merger enforcement efforts of both agencies appear to reflect a new willingness to take care of the business at hand.

And so it is in that spirit that I welcome our two witnesses, both who I think are moving us in a new and more vigorous direction.

I will submit the rest of my statement for the record, Mr. Chairman, and yield back.

[The prepared statement of Mr. Conyers follows:]

Statement of the Honorable John Conyers, Jr.
for the Hearing on "Oversight of the Antitrust Enforcement Agencies" Before the Subcommittee on Regulatory Reform, Commercial and Antitrust Law

Friday, May 15, 2015, at 9:00 a.m.
2141 Rayburn House Office Building

Today's oversight hearing on the Department of Justice's Antitrust Division and the Federal Trade Commission's Bureau of Competition, provides an excellent opportunity for us to focus on the critical purpose of antitrust law, which is to ensure that businesses do not behave in ways that injure markets, and, ultimately, consumers.

This means that any conduct that gives a company the unfettered ability to raise prices or otherwise harm consumers is contrary to basic antitrust policy.

And, we should be especially skeptical about the rapid succession of big mergers in a range of industries, from airlines to telecommunications.

Unfortunately, antitrust scrutiny of mergers has been woefully insufficient over the past 30 years until only recently.

The very fact that many industries are now dominated by just a handful of very large firms attests to this failure of aggressive scrutiny.

There have been four great waves of mergers since the 1980's, and during each wave, firms justify mergers with often dubious promises of efficiencies and innovation that supposedly would benefit consumers.

In telecommunications, for example, there have been at least 12 major mergers or acquisitions since 1997.

The $186.2 billion AOL-Time Warner merger, the largest merger of all time, turned out to be a flop, and not the boon for consumers it was supposed to be.

These companies actually split in 2009 when the ill-conceived merger could not be sustained, with AOL now once again a takeover target.

In the banking industry, there have been 50 mergers since 2001, with financial power being concentrated in ever fewer firms.

Such concentration, combined with lax regulation, resulted in the 2008 financial crisis, "too big to fail" banks, a government bailout, and the greatest downturn since the Great Depression.

In the airline industry, after decades of consolidation, including 6 major mergers since 2001, we are down to only 3 large legacy carriers, with little prospect for meaningful competition, resulting in higher costs, fewer options, and poor service for consumers.

In the pharmaceutical industry, mega-mergers like Merck's acquisition of Schering-Plough in 2009 resulted in more than 27,700 jobs lost in 2010 alone.

Basic economics and common sense should tell us that where there are only a few dominant firms, consumers can be forced to pay higher prices and to accept suboptimal products or services with little consequence to the dominant firms.

This hands-off approach to merger enforcement reflected the misguided view that corporate power should trump other interests, including the public interest. As a result, the trend in antitrust law had been against the American consumer, and it will take much effort to undo the damage.

In view of the accumulating evidence regarding the adverse effects of mergers from decades of lax enforcement, the antitrust enforcement agencies should conduct more retrospective reviews of the effects of consummated transactions to inform their merger reviews going forward.

Given the already substantial challenges that the antitrust agencies face, I am particularly wary of efforts in Congress to undermine their authority.

For example, last Congress, our Committee considered legislation that, among other things, would have eliminated the Federal Trade Commission's authority to use its administrative process in merger cases.

I expressed deep concern about that effort and remain concerned about any future efforts to undermine agency authority.

The good news is that the merger enforcement efforts of both agencies appear to reflect a willingness to be more skeptical of corporate claims of the benefits of mergers.

I am heartened by what appears to be a renewed vigor in antitrust enforcement that these agencies have exhibited.

These enforcement activities appear to have achieved some pro-consumer results.

For example, AT&T and T-Mobile dropped their plans to merge, while Anheuser Busch agreed to divest itself of all of Grupo Modelo's U.S. business in response to the Justice Department's lawsuit to block their transaction.

The Federal Trade Commission, meanwhile, has achieved important victories for consumers before the U.S. Supreme Court. Most recently, the Commission prevailed in a case where the Court limited the scope of the antitrust immunity available under the state action doctrine.

Notwithstanding this generally positive record, some decisions still give me pause.

For instance, at our last oversight hearing, I expressed concerns about the Justice Department's decision to settle its case against the American Airlines-US Airways merger, which had been the first court challenge to an airline merger since 2001.

I remain skeptical that this was the best outcome for consumers. I hope to learn whether the benefits of the remedies in that settlement actually came to pass.

I thank our distinguished witnesses for being here today and look forward to their testimony.

Mr. MARINO. Thank you.

Without objection, the Members' opening statements will be made part of the record.

We have an exceptionally distinguished and experienced witnesses today. And I want to welcome you and thank you for being here.

I will begin by swearing you in. Would you please stand.

Do you swear that the testimony you are about to give is the truth, the whole truth, and nothing but the truth, so help you God?

Let the record reflect that the witnesses have answered in the affirmative.

You may be seated, please.

Mr. Baer was sworn in as Assistant Attorney General for the Department of Justice Antitrust Division in January of 2013. Prior to his appointment, he was a partner in Arnold & Porter and head of the firm's antitrust practice group and head of the FTC's competition bureau from 1995 to 1999.

Mr. Baer received a J.D. From Stanford Law School in 1975 and served as an editor of Stanford's Law Review. He received a B.A. From the Lawrence University in 1972, where he graduated cum laude and Phi Beta Kappa.

Thank you for being here, sir.

Federal Trade Commission Chairwoman Edith Ramirez was sworn in as Commissioner of the FTC in April of 2010 and designated the chairwoman by President Obama on March 4th of this year. Before joining the Commission, Ms. Ramirez was a partner at Quinn Emanuel in Los Angeles, representing clients in intellectual property, antitrust, and unfair competition suits.

Chairwoman Ramirez graduated from Harvard Law School cum laude, where she served as editor of the Harvard Law Review and holds an A.B. In history and magna cum laude from the University of Harvard.

And welcome.

Each of the witnesses' writtenstatements will be entered into the record in its entirety. I ask that each witness summarize his or her testimony in 5 minutes or less. You see the lights in front of you. You know how they work. I'm not going to explain it.

So, Mr. Baer, you are up.

TESTIMONY OF THE HONORABLE WILLIAM J. BAER, ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION, U.S. DEPARTMENT OF JUSTICE

Mr. BAER. Thank you, Mr. Chairman.

Mr. Chairman, Vice Chairman Farenthold, Ranking Member Johnson, Mr. Conyers, Representative Cicilline, I appreciate the opportunity to be back. I appreciate the role of the oversight that this Subcommittee and this Judiciary Committee has historically provided the Antitrust Division. It is an honor, as always, to share the witness table with my friend and my colleague, Chairwoman Ramirez.

The antitrust laws that the Antitrust Division is privileged to enforce reflect judgments made by prior Congresses, 125 years ago in the case of the Sherman Act, 100 years ago with respect to the Clayton and FTC Acts, that free markets and competition are the

cornerstones of our economy. Antitrust enforcers serve as the economic cop on the beat, making sure we all play by the same rules, acting decisively where companies and company executives seek to restrain those free market forces.

Our job, stated simply, is to ensure that your constituents benefit from lower prices and higher quality goods and services that competition provides. And that means smokestack industries to high-tech markets, from health care to financial services, from e-books to airlines. Since I was last here about a year and a half ago, we have worked hard at the Antitrust Division to enforce the antitrust laws with vigor, with transparency, with fairness, and an analytical rigor. My prepared testimony provides the details.

Let me just highlight a couple of things, if I may. Two weeks ago the Department of Justice showed its continuing resolve to prosecute financial crimes. We held Deutsche Bank accountable for manipulating the LIBOR rate, a key financial matrix, and forced them to pay a record $775 million penalty for fraud and antitrust violations.

It is part of our ongoing effort to address restraints on competition in financial markets that includes LIBOR, municipal bond investment instruments, foreign currency exchange—an ongoing matter—real estate foreclosure bid rigging, and tax lien auction bid rigging.

Mr. Chairman, no company is too big to prosecute. No one is too big to jail. And company executives who participate in these conspiracies will be charged along with the companies. In the last 6 years, the Antitrust Division has brought felony charges against 132 different companies. We have obtained almost $6 billion in penalties.

We prosecuted, charged criminally, almost 400 individual wrongdoers. Ten years ago the average sentence for a criminal charge brought by the Antitrust Division was about 12 months. In 10 years, we more than doubled that, to an average of 25 months.

Foreign nationals don't escape our scrutiny by engaging in offshore conduct that affects the U.S. market and U.S. consumers. A third of the individuals we have charged are foreign nationals. Many of them have agreed to come back to the United States and serve time. In other cases, we have successfully extradited individuals to come back and face the music.

On the civil side, where we share enforcement with Chairwoman Ramirez and her talented group that are located about a block and a half from where I work, we have taken systematic action against both bad conduct and bad mergers.

Most recently American Express was ordered by a judge in Brooklyn to abandon anti-steering rules that limited credit card competition. You all know that Comcast and Time Warner, after hearing antitrust concerns articulated by the Antitrust Division and the Federal Communications Commission, decided to give up on its proposed transaction.

We don't work alone. We work in partner with the FBI, which is instrumental in prosecuting these antitrust crimes. We worked over the last 5 years with 51 different State attorneys general in cooperation. Internationally, we work to export the principles of

sound competition law enforcement. That's transparency, procedural fairness, and even-handed enforcement.

We think, at the end of the day, there is a good value proposition for the scarce taxpayer dollars you entrust us with. I thank, as my time runs out, the women and the men of the Antitrust Division who work so hard on behalf of your constituents and the American consumer.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Baer follows:]

Department of Justice

STATEMENT OF

BILL BAER
ASSISTANT ATTORNEY GENERAL
ANTITRUST DIVISION
U.S. DEPARTMENT OF JUSTICE

BEFORE THE

SUBCOMMITTEE ON REGULATORY REFORM,
COMMERCIAL AND ANTITRUST LAW
COMMITTEE ON THE JUDICIARY
U.S. HOUSE OF REPRESENTATIVES

FOR A HEARING ENTITLED

OVERSIGHT OF THE ANTITRUST ENFORCEMENT AGENCIES

PRESENTED

MAY 15, 2015

STATEMENT
OF
BILL BAER
ASSISTANT ATTORNEY GENERAL
ANTITRUST DIVISION
BEFORE THE
SUBCOMMITTEE ON REGULATORY REFORM,
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COMMITTEE ON THE JUDICIARY
U.S. HOUSE OF REPRESENTATIVES
HEARING ENTITLED
"OVERSIGHT OF THE ANTITRUST ENFORCEMENT AGENCIES"
PRESENTED ON
MAY 15, 2015

Chairman Marino, Vice-Chairman Farenthold, Ranking Member Johnson, and distinguished members of the subcommittee, thank you for inviting me to appear before you today to discuss the work of the Antitrust Division of the Department of Justice. It is a privilege, as always, to appear with my friend, Federal Trade Commission Chairwoman Ramirez. Together we work to ensure that consumers benefit from competitive markets.

When Attorney General Robert F. Kennedy appeared before this very subcommittee in 1961, he said, "The principles of free enterprise which the antitrust laws are designed to protect and vindicate are economic ideals that underlie the whole structure of a free society." He got that right. When competitive markets function properly, consumers see lower prices and higher quality goods and services. The antitrust laws ensure the integrity of those markets by preventing behavior, consolidation, or barriers that limit competition. Sound antitrust enforcement encourages innovators to innovate and disrupters to disrupt, and provides American consumers with the benefits of dynamic competition.

The Antitrust Division remains committed to carrying out its law enforcement mission in a vigorous, transparent, even-handed, and fact-based fashion. I continue to believe that antitrust is a law enforcement function that transcends both party and politics.

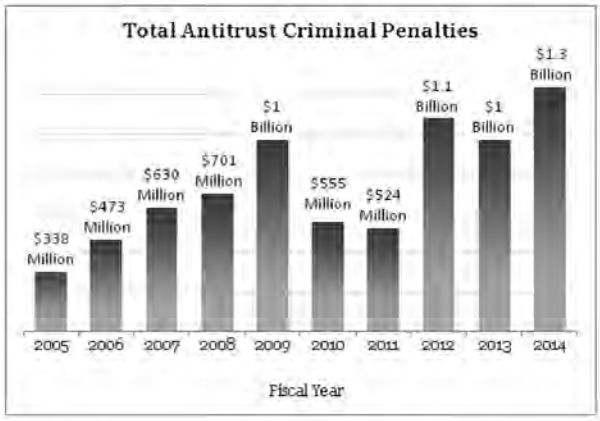
Since my last appearance before this subcommittee, the Antitrust Division has pursued behavior and transactions that threaten to injure competition and the American consumer. In just the last couple of weeks, Deutsche Bank agreed to own up to its involvement in a criminal conspiracy to rig the London Interbank Offered

Rate (LIBOR), a key benchmark interest rate. Comcast and Time Warner Cable abandoned a merger that risked making Comcast an unavoidable gatekeeper for internet-based services that rely on a broadband connection to reach consumers. Beyond these headline-making cases, the division continues to focus on antitrust enforcement in markets that matter to consumers on a daily basis – goods purchased online and at the grocery store, media and entertainment, communications, consumer electronics, health care, transportation, agriculture, energy, and financial services.

The Antitrust Division appreciates that fiscal resources are limited. The division uses the resources entrusted to us by Congress to provide a real return on investment for American consumers, businesses, and taxpayers. For Fiscal Year 2016, the President requested that the Antitrust Division receive an appropriation of $165 million, a 1.7% inflationary increase over 2015. It is a good value proposition. Roughly 50 percent of our funding is offset by Hart-Scott-Rodino (HSR) premerger filing fees paid by companies planning to merge. In addition, the criminal fines we obtain, which are deposited in the Crime Victims Fund, are routinely more than 10 times our annual direct appropriation.

Cartel Enforcement

Let me begin with our efforts to uncover and prosecute cartel behavior, which the Supreme Court has described as "the supreme evil of antitrust." Price fixing and bid rigging stop competition in its tracks and lead to higher prices for consumers. To give you an idea of the volume of commerce involved in cartel misdeeds, last year we obtained nearly $1.3 billion in criminal fines and penalties, the largest amount ever in a single fiscal year.



Criminal misconduct in financial markets remains a major focus. Since 2009, the division has obtained 122 convictions and more than $2 billion in fines and penalties from prosecution of collusion and fraud affecting municipal bond investment instruments, benchmark interest rates, and real estate and tax lien auctions. As I mentioned earlier, Deutsche Bank and its London subsidiary recently agreed to pay $775 million in criminal penalties for its participation in a conspiracy to rig the LIBOR, a leading benchmark interest rate used in financial products and transactions around the world. This illegal conduct undermined the integrity and the competitiveness of financial markets everywhere. As a result of the department's LIBOR investigation, conducted jointly by the criminal and antitrust divisions, thus far banks have paid more than $1.3 billion in fines and penalties and 12 individuals have been charged, three of whom have pleaded guilty.

Using technology to manipulate pricing is a growing concern. We recently secured a guilty plea in a case involving two companies using complex algorithms to fix prices for poster art online. American consumers have the right to a free and fair marketplace online, as well as in brick and mortar businesses.

Our investigation into the auto parts industry continues. There, pervasive price fixing, bid rigging, and market allocation have done serious harm to U.S. automakers and consumers. This is the largest criminal investigation in the Antitrust Division's history and to date has resulted in charges against 35 companies and 52 individuals.

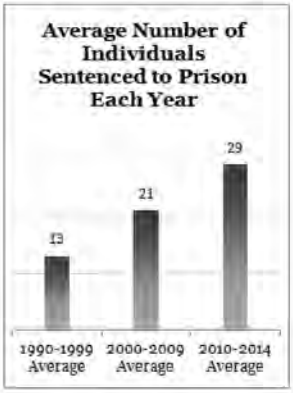
Thus far, 30 executives and 35 corporations have pleaded guilty or agreed to do so and to pay more than $2.5 billion in criminal fines.

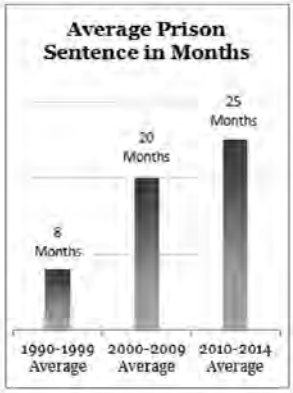
Last year the Ninth Circuit Court of Appeals heard appeals involving our pursuit of price fixing of liquid crystal display (LCD) panels and affirmed the convictions we obtained against AU Optronics, its U.S. subsidiary, and two top executives at the company. The court also affirmed the record-setting $500 million criminal fine imposed on the company and the executives' substantial jail sentences. This decision reinforced prior court rulings that price-fixing cartels that significantly affect U.S. commerce cannot escape the reach of U.S. antitrust enforcement by operating overseas.

In addition to pursuing major national and international cartels, we continue to prosecute local criminal conspiracies. In recent years we have charged over 100 individuals in four states, Alabama, California, Georgia, and North Carolina, for conspiring at local real estate foreclosure auctions. These schemes often involved payoffs in exchange for agreements not to compete in public auctions. The conspiracies depressed auction prices and literally stole money from distressed homeowners and their lenders.

In our investigations we focus on holding both companies and individual wrongdoers accountable and have succeeded in obtaining guilty pleas and winning convictions against high-ranking executives. In Fiscal Year 2014 alone, 44 executives and 18 companies were charged with price-fixing, bid-rigging, and fraud offenses.

These individual wrongdoers are going to jail, and for increasing periods of incarceration. Between 2010 and 2014, the average number of individuals sentenced to prison increased 38 percent and the average sentence increased from 20 months to 25 months when compared with the previous five year period.





Foreign nationals do not escape responsibility when they conspire to injure American consumers from afar. We prosecute foreign companies and their executives, and seek extradition of foreign nationals who attempt to evade the jurisdiction of the U.S. courts. Last year, working with our international partners and Department of Justice colleagues, an Italian national was extradited from Germany for participating in a conspiracy to rig bids, fix prices, and allocate market shares for marine hose sold in the U.S. We also extradited a Canadian national charged with conspiracy to defraud the Environmental Protection Agency's cleanup of certain Superfund sites in New Jersey.

Throughout, the FBI has been a critical partner in the division's pursuit of cartels. We appreciate the FBI's support and expertise in our investigations, and we will continue to work together to detect and prosecute criminal antitrust violations.

Aggressively pursuing criminal price-fixers benefits competition and consumers in multiple ways – it stops the illegal conduct, puts others engaged in similar behavior on notice that they may be our next target, and sends a strong signal to those contemplating price fixing to deter them from committing the crime in the first place. Moreover, and this is sometimes overlooked, it reinforces the antitrust compliance culture of the vast majority of companies who work hard to get it right.

Civil Enforcement

Like the criminal program, our civil enforcement efforts protect U.S. consumers from threats to competition. Here too, the business community benefits from vigorous

antitrust enforcement against those who fail to play by the rules. Our record sends a strong message that the antitrust division will challenge those who engage in conduct that stifles competition or pursue mergers that may substantially lessen competition.

In the past two months, three major mergers were abandoned after the division expressed serious competitive concerns. You are all familiar with the outcome of the Comcast/Time Warner Cable merger which would have created a market where one company provided almost 60% of high speed internet access. The division's antitrust concerns also led to the recent abandonment of a $10 billion merger between two of the largest makers of semi-conductor manufacturing equipment, Applied Materials Inc. and Tokyo Electron Ltd. This result preserves competition and future innovation for the development of machinery used to make the memory and logic chips that power smart phones, tablets, computers and many other products. We also blocked a merger between National Cinemedia Inc. and Screenvision LLC– the only two significant cinema advertising networks in the U.S., which provide preshow advertisements at movie theaters. In March, on the eve of trial, the parties called off the merger. As a result, competition between these two companies will continue to benefit advertisers, movie theaters, and moviegoers.

When I last testified before this subcommittee the division was litigating three important civil antitrust actions. We have had notable success in them all. In the American Express case, the district court held that the company's anti-steering rules preventing merchants from using competition to help keep credit card swipe fees down were illegal. It recently entered an injunction ordering American Express to eliminate the rules, benefiting merchants who pay more than $50 billion in credit card "swipe fees" annually, as well as the consumers who ultimately bear these costs. With this outcome, American Express joins Visa and MasterCard in being prevented from enforcing rules that restrict credit card competition, and retailers and consumers will benefit.

We also won our challenge to Bazaarvoice, Inc.'s acquisition of PowerReviews, Inc., its only significant rival in the business of providing ratings and review software to shopping websites. The resulting remedy – which required Bazaarvoice to divest PowerReviews' business – restored competition so that online retailers and manufacturers would continue to benefit from a competitive market.

Finally, we resolved our lawsuit against a joint venture between Coach USA and City Sights LLC that eliminated competition and raised prices for hop-on, hop-off bus tours in New York City. In addition to remedying ongoing competitive harm, our joint settlement with the New York Attorney General required the defendants to give

up $7.5 million in profits they obtained from the operation of their illegal joint venture.

The division also forced merging parties to surrender ill-gotten profits obtained through unlawful premerger coordination. Flakeboard America Limited and SierraPine, two makers of particleboard widely used in furniture and kitchen cabinets, ultimately abandoned their merger because of the competitive concerns we raised. We also held Flakeboard accountable for violating the antitrust laws by agreeing to close one of SierraPine's facilities during the pendency of our merger investigation. We insisted as a term of settlement that Flakeboard surrender its ill-gotten profit associated with its law violations.

Previously, I testified about merger challenges involving beer and airlines. Let me report to you on how the settlements we obtained are working out for the American consumer. In January 2013, the division filed suit to stop Anheuser-Busch InBev's (ABI) proposed acquisition of Grupo Modelo, the largest and third-largest firms selling beer in the United States. We reached a settlement that required the companies to divest Modelo's entire U.S. business and create an independent, fully integrated and economically viable competitor. This structural remedy is paying off for the American consumer. Constellation – the new owner – has begun offering new products, bringing competition to segments of the market that Grupo Modelo had previously ignored. Constellation is also increasing capacity and, according to its executives, continues to grow its U.S. sales faster than the market as a whole.

Airline competition is vital to American travelers. Consumers are benefiting from the divestitures we required as a condition of the American Airlines-US Airways merger. At Reagan National, the carriers who acquired slots divested by American have added capacity and introduced more than 40 additional departures each day, including service to 14 new airports. In addition, slot and gate divestitures at LaGuardia, O'Hare, and Dallas Love Field have triggered new service to more destinations.

Competition in agricultural markets remains a focus because of its importance to both farmers and consumers. Last year the division required a divestiture in the Tyson Foods-Hillshire merger to preserve a competitive market for hog farmers to sell their products. We also sued to block a joint venture between several flour millers. The settlement ensured flour milling operations in California, Texas, and Minnesota remained competitive in order to keep prices low for wheat flour-based products such as bread, cookies, and crackers.

The division recognizes that competitive health care markets serve to keep prices in check, improve quality, and spur innovation. We challenge anticompetitive conduct by both providers and insurers. In our case against Blue Cross Blue Shield of Michigan, the division challenged anticompetitive "most favored nation" clauses that inhibited hospitals from negotiating competitive contracts with other insurers. We also worked closely with the Massachusetts Attorney General on the investigation into the acquisition of South Shore Hospital by Partners HealthCare. The merger was later abandoned and, as a result, competition between these hospitals will continue to benefit consumers and other payers. Through effective enforcement, antitrust guidance, and competition advocacy, we help providers and insurers direct their creativity towards innovative ways to offer low cost, high quality health care that benefits patients while preserving competition.

Advocacy and Interagency Collaboration

Competition advocacy and collaboration are important elements of effective antitrust enforcement. We regularly work with the FTC to hold public workshops to provide a forum for open discussion on the most challenging and cutting-edge competition issues of the day. Recent workshops have focused on health care, conditional pricing practices, and patent assertion entities. In addition to the FTC, we cooperate with the Federal Communications Commission and the Departments of Transportation, Health and Human Services, Commerce, and Agriculture, among others, to ensure that public policy represents sound competition principles.

We also have forged strong partnerships with state attorneys general. In the last six years, we have partnered with 49 state attorneys general, the District of Columbia, and Puerto Rico, including 17 states in the American Express case and 33 states in our case against Apple for conspiring to fix prices for e-books.

Consumers and businesses benefit from the division's ongoing collaboration with foreign competition authorities. We work with fellow enforcers from many jurisdictions – both bilaterally and in organizations like the Organisation for Economic Co-operation and Development and the International Competition Network – to share best practices, strengthen the bonds that link the international antitrust enforcement community, and promote sound antitrust policy. We are proud to export our principles of procedural fairness, transparency, and nondiscriminatory enforcement.

Aiding Business Community Antitrust Compliance and Reducing Burdens

We appreciate the value that antitrust guidance can provide to industry as new business models and technologies emerge. For example, last April, we issued a joint policy statement with the FTC to clarify that properly designed cyber threat information sharing is not likely to raise antitrust concerns. We subsequently issued a business review letter stating that the division would not challenge a proposal by a company seeking to offer a cyber intelligence data-sharing platform that allows members to share threat and incident data about cyber attacks.

The division also issued a business review letter in response to a request from the Institute of Electrical and Electronics Engineers, Inc. (IEEE), a standard setting organization, regarding a proposed update to its patent policy. This letter continued our effort to provide guidance that facilitates the development of procompetitive patent policies by standard setting organizations. We think this type of guidance exemplifies good government and we will continue to provide it when asked to do so.

While vigilant antitrust enforcement makes our markets more competitive and saves consumers money, we appreciate that dealing with antitrust enforcers can be expensive and time consuming. We work hard to make enforcement as efficient as possible without compromising our mission. Improving electronic discovery is one promising avenue for reducing the burdens our investigations can impose. For example, our website includes a model civil electronic production letter that helps parties understand and plan for productions to the division, making the process more predictable and less burdensome.

Further, the division has been a pioneer among government agencies in using predictive coding methods in large volume document productions. Predictive coding is a technology-assisted document review that, when used properly and with appropriate safeguards, can more quickly and accurately identify relevant documents, saving the parties time and money, while providing the division the documents it needs to effectively conduct its investigations.

Finally, last March the division announced a new streamlined procedure for parties seeking to modify or terminate old antitrust settlements and litigated judgments entered before 1980. We are not going to object to eliminating a decree that has clearly outlived its usefulness. In those cases, parties no longer have to offer an elaborate justification and the division does not need to invest scarce resources in getting to the obvious answer.

Conclusion

The Antitrust Division's dedicated public servants continue to work hard to make sure that American consumers and businesses reap the benefits of our free-market economy. We use our tools – criminal and civil enforcement, together with focused and effective competition advocacy – to do so. We are committed to ensuring that the American consumer continues to benefit from vigorous competition for products and services. I am honored to be part of this hard-working team.

Mr. MARINO. Thank you Assistant General.
Commissioner Ramirez.

TESTIMONY OF THE HONORABLE EDITH RAMIREZ, CHAIRWOMAN, FEDERAL TRADE COMMISSION

Ms. RAMIREZ. Thank you, Chairman Marino, Ranking Member Johnson, and Members of the Subcommittee for inviting me to testify regarding the Federal Trade Commission's current antitrust enforcement and policy efforts.

I'm pleased to be here with Assistant Attorney General Bill Baer. We have a very close working relationship with the Department of Justice's Antitrust Division, and it's been an honor to work with him and with his staff.

Last year the FTC celebrated its centennial. For more than 100 years now, the Commission has worked to ensure that American markets are open, vibrant, and unencumbered by unreasonable private or public restraints.

One of our main responsibilities is preventing mergers that may substantially lessen competition. In fiscal year 2014 and through the first half of fiscal year 2015, we've challenged 28 mergers.

In most of those cases, we negotiated a remedy allowing the merger to proceed. But in three instances the Commission authorized the staff to stop the merger, and in three other cases the parties abandoned the deal after we raised concerns.

We also maintain an active program to identify and stop anticompetitive business practices. During the same timeframe, we brought nine enforcement actions to stop harmful conduct, such as unlawful exclusive dealing and invitations to collude.

We focus our efforts, in particular, on sectors of the economy where actions will provide the greatest benefits with the largest number of consumers, including health care and consumer products. Anticompetitive mergers and conduct in healthcare markets, in particular, can threaten to undermine efforts to control costs.

As shown by two recent important appellate wins in the St. Luke's and ProMedica cases, we remain committed to preserving and promoting competition in healthcare provider markets. Merger activity in the pharmaceutical sector has also increased significantly, and we carefully review mergers between drug manufacturers to prevent them from acquiring market power and raising prices on crucial drugs.

In the last 2 years alone, we took action in 13 pharmaceutical mergers ordering divestitures to preserve competition for drugs that treat diabetes, hypertension, and cancer, as well as widely used generic medications, like oral contraceptives and antibiotics.

We also continue to protect consumers from anticompetitive drug patent settlements that delay generic entry. We will be starting a trial in Federal court in Philadelphia on June 1 in one of these cases, Cephalon, involving the billion-dollar drug Provigil.

Given their direct impact on consumers' pocketbooks, we also seek to promote competition for consumer products. We're currently in Federal court here in the District seeking a preliminary injunction in our challenge to the proposed merger between Sysco and US Foods, the country's two largest food service distributors. We allege

that the transaction will lead to higher prices and reduced service for national customers as well as customers in 32 local markets.

Additionally, earlier this year the Commission ordered the largest divestiture ever in a supermarket merger, requiring Albertsons and Safeway to sell 168 supermarkets and 130 local markets in several Western States, ensuring that communities continue to benefit from competition among their local supermarkets.

In addition to the appellate victories that I mentioned earlier, we recently had two other important wins that I'd like to highlight. In North Carolina Dental, we obtained our third Supreme Court win in the last 2.5 years when the court affirmed the Commission's ruling that the State Action Doctrine does not immunize the anticompetitive conduct of unsupervised State boards comprised of private-market participants. This victory is significant because occupational licensing governs a substantial and growing segment of the U.S. economy and incumbent providers can use regulations to deter new forms of competition.

Additionally, the Eleventh Circuit agreed with the Commission's decision in the McWane case that a monopolist's exclusive dealing practices violated the antitrust laws by preventing would-be market entrants from becoming meaningful competitors in the market for domestic pipefittings.

The Commission also remains active in research and policy. Next month we will hold a workshop devoted to the so-called sharing economy to explore how existing regulatory frameworks can accommodate new business models while at the same time maintaining appropriate consumer protections and a competitive marketplace. The workshop will complement our enforcement and policy work, including advocacy work discouraging unnecessary regulations that could hamper competition from Uber and other ride-sharing services.

Finally, on the international front, we routinely engage with our foreign antitrust counterparts so that competition laws function coherently and effectively worldwide, benefiting U.S. businesses and consumers at home and globally.

Thank you. And I will be happy to answer any questions.

[The prepared statement of Ms. Ramirez follows:]

Prepared Statement of
the Federal Trade Commission

Before the
United States House of Representatives
Committee on the Judiciary
Subcommittee on Regulatory Reform, Commercial and Antitrust Law

"Oversight of the Enforcement of the Antitrust Laws"

Washington, D.C.
May 15, 2015

Chairman Marino, Ranking Member Johnson, and Members of the Subcommittee, thank you for the opportunity to appear before you today. I am Edith Ramirez, Chairwoman of the Federal Trade Commission, and I am pleased to testify on behalf of the Commission and discuss some of our current competition enforcement activities and priorities.[1]

Last year, the Federal Trade Commission celebrated its centennial, a milestone that provided an opportunity to reflect on the policies and people that have contributed to the agency's successes and to consider what challenges lie ahead. For over 100 years, the FTC has worked to ensure that American markets are open, vibrant, and unencumbered by unreasonable private or public restraints. Throughout its history, the FTC has tackled the complex competition issues of the day, guiding antitrust policy from a time of horses and buggies to our modern interconnected, global economy. As the Commission enters its second century, it does so buoyed by recent federal court victories that affirm the FTC's role as a champion of the national policy of fair and vigorous competition to benefit consumers.

As the members of this Subcommittee know, competitive markets are the foundation of our economy, and effective antitrust enforcement helps ensure that those markets function well and benefit both consumers and businesses alike. As the Supreme Court recently declared in upholding the Commission's decision in *North Carolina State Board of Dental Examiners v. FTC*, "[f]ederal antitrust law is a central safeguard for the Nation's free market structures."[2] The FTC's special role in enforcing these laws and studying emerging trends in markets has contributed to a culture of competition that is central to economic growth and opportunity.

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[1] This written statement represents the views of the Federal Trade Commission. My oral presentation and responses to questions are my own and do not necessarily reflect the views of the Commission or of any other Commissioner.

[2] *North Carolina St. Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101, 1109 (2015) ("*N.C. Dental*").

I. The FTC's Competition Enforcement Work

The Commission seeks to promote competition through a thorough, fact-intensive approach to law enforcement. The FTC has jurisdiction over a wide swath of the economy and focuses its enforcement efforts, as will be addressed below, on sectors that most directly affect consumers and their pocketbooks, such as health care, consumer products and services, technology, manufacturing, and energy. The agency shares primary jurisdiction with the Department of Justice in enforcing the nation's antitrust laws.

One of the agency's principal responsibilities is to prevent mergers that may substantially lessen competition. Premerger filings under the Hart-Scott-Rodino Act rose 25 percent in FY 2014 as compared to FY 2013.[3] The vast majority of those reported transactions—over 96% in each of the last five years—are allowed to proceed without further inquiry, and only a small fraction of proposed or consummated mergers require additional investigation to determine whether they are likely to violate Section 7 of the Clayton Act. During FY 2014, the Commission challenged 17 mergers after the evidence showed that they would likely be anticompetitive,[4] and through the first half of FY 2015, the Commission initiated 11 additional merger enforcement actions, including our pending preliminary injunction action to block the proposed merger between Sysco Corporation and US Foods.[5]

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[3] In FY 2014, the Agencies received notice of 1,618 transactions in which a Second Request could have been issued, compared with 1,326 in FY 2013.

[4] During FY 2014, the Commission accepted 13 negotiated settlements resulting in final orders requiring divestitures, and three transactions were abandoned as a result of antitrust concerns raised during the investigations. In one additional matter, a proposed merger involving class ring manufacturers Jostens and American Achievement Corp., the Commission authorized an administrative complaint and initiated proceedings to obtain a preliminary injunction in federal district court to enjoin the acquisition pending resolution of the Commission's administrative litigation; the parties abandoned their plans after the Commission issued its complaint. Data on the FTC's competition workload is available on its website at https://www ftc.gov/competition-enforcement-database.

[5] From October 2014 through March 2015, the Commission accepted for comment nine proposed consent orders requiring divestitures, and authorized administrative complaints and related preliminary injunction actions to block two proposed mergers. As discussed further below, in one of these mergers, Verisk Analytics' proposed acquisition

The Commission also maintains a robust program to identify and stop anticompetitive business conduct.[6] For example, recent enforcement actions have challenged allegedly exclusionary tactics to maintain a monopoly position,[7] eliminated allegedly unreasonable provisions in trade association ethical codes that prevented competition among members,[8] and stopped an allegedly illegal invitation-to-collude between two resellers of internet barcodes.[9] In addition to stopping anticompetitive conduct, these actions also provide guidance to other businesses to help them comply with antitrust standards.

A. Recent Appellate Victories

Before addressing enforcement efforts in specific sectors of the economy, the FTC has recently obtained several important rulings from the Supreme Court and federal courts of appeals upholding its decisions on key aspects of antitrust doctrine. Of particular note is the

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of Eagle View Technology, the parties abandoned their merger plans after the Commission issued its complaint. *See* FTC News Release, Statement of FTC Bureau of Competition Director Deborah Feinstein on Verisk's Decision to Drop its Proposed Acquisition of EagleView Technology Corporation (Dec. 17, 2014), *available at* https://www.ftc.gov/news-events/press-releases/2014/12/statement-ftc-bureau-competition-director-deborah-feinstein. The remaining challenge to block the proposed Sysco-US Foods merger is pending.

[6] During FY 2014, the FTC entered into six consent agreements resolving competitive concerns in conduct investigations, issued one administrative complaint, and filed one permanent injunction action in federal court. Since October 1, 2014, the Commission has issued two additional administrative complaints and one proposed stipulated order in federal court.

[7] FTC News Release, Cardinal Health Agrees to Pay $25.8 Million to Settle Charges It Monopolized 25 Markets for the Sale of Radiopharmaceuticals to Hospitals and Clinics (Apr. 20, 2015), *available at* https://www ftc.gov/news-events/press-releases/2015/04/cardinal-health-agrees-pay-268-million-settle-charges-it. Commissioners Ohlhausen and Wright voted against accepting the proposed consent agreement. *See* Dissenting Statement of Commissioner Ohlhausen, *Cardinal Health, Inc.*, File. No. 101-006 (Apr. 17, 2015), *available at* https://www.ftc.gov/system/files/documents/public_statements/637761/150420cardinalhealthohlhausen.pdf; Dissenting Statement of Commissioner Wright, *Cardinal Health, Inc.*, File. No. 101-006 (Apr. 17, 2015), *available at* https://www ftc.gov/system/files/documents/public_statements/637771/150420cardinalhealthwright.pdf.

[8] FTC News Release, To Settle FTC Charges, Two Trade Associations Agree to Eliminate Rules that Restrict Competition (Dec. 23, 2014), *available at* https://www ftc.gov/news-events/press-releases/2014/12/settle-ftc-charges-two-trade-associations-agree-eliminate-rules.

[9] FTC News Release, Two Barcode Resellers Settle FTC Charges That Principals Invited Competitors to Collude (Jul. 21, 2014), *available at* https://www ftc.gov/news-events/press-releases/2014/07/two-barcode-resellers-settle-ftc-charges-principals-invited.

Commission's win before the Supreme Court in *N.C. Dental*.[10] The Supreme Court agreed with the Commission that "a state board on which a controlling number of decision-makers are active market participants in the occupation the board regulates must satisfy [the] active supervision requirement in order to invoke state action antitrust immunity."[11] The *N.C. Dental* decision is just the most recent example of the Commission's longstanding effort, which also includes the 2013 Supreme Court ruling in the Commission's favor in *FTC v. Phoebe Putney*,[12] seeking to clarify the scope of the state action doctrine. The *N.C. Dental* decision is particularly important because occupational licensing requirements govern a substantial and growing segment of the US economy,[13] and incumbents can use that power to keep new forms of competition out of the market.

The Commission earned another significant appellate win last month when the Eleventh Circuit affirmed the Commission's decision and order in a monopolization case involving McWane, Inc.[14] There, the Eleventh Circuit upheld the Commission's ruling that a monopolist's exclusive dealing practices violated the antitrust laws because they prevented would-be market entrants from becoming meaningful competitors in the market for domestic pipe fittings, resulting in higher prices for municipalities and other waterworks customers.

The Commission also recently achieved two important appellate wins in health care provider merger challenges. In the first, the Sixth Circuit Court of Appeals issued the first

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[10] *N.C. Dental*, 135 S. Ct. at 1117.

[11] *N.C. Dental*, 135 S. Ct. at 1114.

[12] *FTC v. Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 2003 (2013).

[13] *See, e.g.*, Morris M. Kleiner, *Reforming Occupational Licensing Policies*, The Hamilton Project, Discussion Paper 2015-1, at 5 (March 2015), *available at* http://www.brookings.edu/~/media/research/files/papers/2015/03/11-hamilton-project-expanding-jobs/thp_kleinerdiscpaper_final.pdf.

[14] *McWane, Inc. v. FTC*, No. 14-11363, 2015 U.S. App. LEXIS 6111 (11th Cir. Apr. 15, 2015).

appellate decision involving a hospital merger in over 15 years when it upheld the Commission's decision requiring ProMedica Health System to divest its rival, St. Luke's Hospital, because the merger would have given ProMedica the leverage to demand higher rates from health plans.[15] The court concluded that the size and competitive significance of ProMedica, combined with St. Luke's location in the affluent southwestern Toledo suburbs, would have made ProMedica virtually indispensable to health plans post-merger.

In the second, the FTC achieved a significant victory when the Ninth Circuit Court of Appeals affirmed the district court's decision in *St. Luke's* that Idaho's dominant healthcare system's acquisition of the state's largest independent physician practice group violated the antitrust laws.[16] The Ninth Circuit agreed with the trial court's determination that the deal would have given the combined entity the power to demand higher rates in the market for adult primary care services in Nampa, Idaho, the state's second-largest city. The court did not find St. Luke's quality-based efficiencies defense adequate to rebut a prima facie case that a merger would be anticompetitive.

This testimony now highlights important Commission efforts to promote competition in key sectors of the American economy.

B. Promoting Competition in Health Care Markets

The high cost of health care is a serious concern for most Americans. Health care consolidation can threaten to undermine efforts to control these costs, and it is critical that the Commission act to preserve and promote competition in health care markets. Competition

[15] *ProMedica Health Sys., Inc. v. FTC*, 749 F.3d 559 (6th Cir. 2014).

[16] *St. Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd.*, 778 F.3d 775 (9th Cir. 2015).

encourages market participants to deliver cost-effective, high-quality care and to pursue innovation to further these goals.

1. Preventing Anticompetitive Health Care Mergers

The FTC devotes significant resources to preventing mergers that threaten to raise prices or undermine cost-containment efforts in a variety of health care markets, including in both health care provider and pharmaceutical markets.[17]

The Commission monitors an increasing number of mergers involving health care providers, including deals involving hospitals, physicians, clinics, and surgery centers, and intervenes when they pose a threat to competition. In addition to the *ProMedica* and *St. Luke's* cases discussed above, in recent years the Commission has successfully challenged a number of hospital mergers,[18] as well as mergers involving surgery centers,[19] psychiatric hospitals,[20] and dialysis clinics.[21]

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[17] For a summary of FTC enforcement actions relating to health care, *see* Overview of FTC Antitrust Actions in Health Care Services and Products (March 2013), *available at* https://www.ftc.gov/system/files/attachments/competition-policy-guidance/hcupdaterev.pdf, and Overview of FTC Antitrust Actions in Pharmaceutical Services and Products (March 2013), *available at* https://www.ftc.gov/system/files/attachments/competition-policy-guidance/rxupdaterev.pdf.

[18] *Cmty. Health Sys.*, No. C-4427 (F.T.C. Jan. 22, 2014) (consent order), *available at* https://www.ftc.gov/enforcement/cases-proceedings/131-0202-c-4427/community-health-systems-health-management-associates; *FTC v. OSF Healthcare Sys.*, 852 F. Supp. 2d 1069 (N.D. Ill. 2012); *Inova Health Sys.*, Dkt. No. 9326 (F.T.C. June 17, 2008) (order dismissing complaint), *available at* www ftc.gov/sites/default/files/documents/cases/2008/06/080617orderdismisscmpt.pdf.

[19] *H.I.G. Bayside Debt*, No. C-4494 (F.T.C. Dec. 24, 2014) (consent order), *available at* https://www ftc.gov/enforcement/cases-proceedings/141-0183-c-4494/hig-bayside-debt-et-al; *Reading Health Sys.*, Dkt. No. 9353 (F.T.C. Dec. 7, 2012) (order dismissing complaint), *available at* https://www.ftc.gov/enforcement/cases-proceedings/1210155/reading-health-system-surgical-institute-reading-matter.

[20] *Universal Health Servs.*, No. C-4372 (F.T.C. Oct. 5, 2012) (consent order), *available at* https://www.ftc.gov/enforcement/cases-proceedings/1210157/universal-health-services-alan-b-miller.

[21] *Fresenius Med. Care AG*, No. C-4348 (F.T.C. Feb. 28, 2012) (consent order), *available at* https://www ftc.gov/enforcement/cases-proceedings/1110170/fresenius-medical-care-ag-co-kgaa-matter.

Ongoing health care reform efforts rely heavily on a market-based system, and antitrust enforcement aimed at preventing health care providers from accumulating market power or engaging in anticompetitive conduct is therefore critical to ensuring that competition drives health care firms to contain costs, improve quality of care, and innovate. These efforts are especially important in light of recent research showing that health care providers with significant market power may be able to negotiate higher than competitive payment rates, often without offsetting improvements in quality.[22]

The antitrust laws are not a barrier to bona fide efforts to improve care through integration or other means. Antitrust allows providers to engage in a wide variety of legitimate collaborations, including mergers, so long as the conduct is unlikely to harm consumer welfare through higher costs or reduced quality. The antitrust enforcement agencies have consistently maintained that bona fide efforts to coordinate health care do not raise antitrust issues so long as those efforts do not result in the accumulation of market power, and that collaborations to reduce costs and improve the quality of health care may be formed through contractual arrangements well short of a merger.[23]

Merger activity in the pharmaceutical sector has also increased significantly in recent years, and the Commission continues to review carefully mergers between pharmaceutical manufacturers to prevent firms from acquiring market power that would allow them to raise prices on crucial medications. In the last two years alone, the Commission has taken action in 13

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[22] *See, e.g.*, Martin Gaynor & Robert Town, *The Impact of Hospital Consolidation – Update*, Robert Wood Johnson Found., The Synthesis Project (June 2012), *available at* http://www rwjf.org/en/research-publications/find-rwjf-research/2012/06/the-impact-of-hospital-consolidation.html.

[23] U.S. Dep't of Justice & FTC, Statements of Enforcement Policy in Health Care (1996), *available at* https://www.ftc.gov/sites/default/files/attachments/competition-policy-guidance/statements_of_antitrust_enforcement_policy_in_health_care_august_1996.pdf

pharmaceutical mergers, ordering divestitures to preserve competition in the sale of 44 pharmaceutical products used to treat a variety of conditions, such as hypertension, diabetes, and cancer, as well as widely-used generic medications such as oral contraceptives and antibiotics.

The Commission remains attentive to mergers involving competing medical device manufacturers. For example, the Commission required medical technology company Medtronic, Inc. to divest the drug-coated balloon catheter business of Covidien in order to complete its $42.9 billion acquisition.[24] According to the complaint, at the time of the merger, C.R. Bard was the only company supplying U.S. customers with drug-coated balloon catheters indicated for the femoropopliteal artery, an artery located above the knee. Medtronic and Covidien were the only companies with products in clinical trials, making them the most likely potential entrants. To preserve competition in the future for these important medical products, Medtronic agreed to divest Covidien's business to an FTC-approved buyer that has the industry and regulatory experience to obtain FDA approval for a new product.

2. Combating Efforts to Stifle Generic Competition

A top priority for the Commission over the past 15 years has been stopping anticompetitive reverse-payment settlements of patent litigation in which the brand-name drug firm pays its potential generic rival to abandon a patent challenge and delay entering the market with a lower cost, generic product. The Supreme Court's 2013 decision in *FTC v. Actavis, Inc.*,[25] which held that these agreements were properly subject to antitrust scrutiny, was as an important victory for consumers and a vindication of basic antitrust and free market principles. With it, the Commission achieved one of its top competition priorities: overturning the so-called "scope-of-

[24] *Medtronic, Inc.*, No. C-4503 (F.T.C. Jan. 21, 2015) (consent order), *available at* https://www.ftc.gov/enforcement/cases-proceedings/141-0187/medtronic-inc-covidien-plc-matter.

[25] *FTC v. Actavis, Inc.*, 133 S. Ct. 2223 (2013).

the-patent" test, which had been adopted by some courts and virtually immunized pay-for-delay settlements from antitrust scrutiny.

Because of the *Actavis* decision, we are in a much stronger position to protect consumers from anticompetitive drug-patent settlements that result in higher drug costs.[26] The Commission has continued to pursue pay-for-delay cases, including *Actavis* and *FTC v. Cephalon*,[27] with trial in the latter scheduled to begin on June 1, 2015, in federal district court in Philadelphia. We also continue to pursue additional pay-for-delay investigations, and review pharmaceutical patent settlements that companies are required to file with the FTC and DOJ following the 2003 Medicare Modernization Act.

In addition to this enforcement work, we monitor pending pay-for-delay cases for potential amicus opportunities in private litigation where our experience and expertise could prove helpful to the courts deciding those matters. For example, we recently filed an amicus brief with the Third Circuit helping to clarify that patent litigation settlements containing a "no-authorized-generic" commitment, in which the brand-name drug firm agrees not to launch its own authorized generic when the first generic company begins to compete, raise the same issues addressed by the Supreme Court in *Actavis*.[28] Even though no cash payments are involved, the companies still share profits by agreeing to avoid competing, which can result in delayed generic entry and harm to consumers.

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[26] FTC, *Pay For Delay: How Drug Company Pay-Offs Cost Consumers Billions* (Jan. 2010), *available at* http://www ftc.gov/os/2010/01/100112payfordelayrpt.pdf.

[27] *FTC v. Cephalon, Inc.*, No. 08-cv-2141 (E.D. Pa. complaint filed Feb. 13, 2008), *available at* http://www2 ftc.gov/os/casclist/0610182/080213complaint.pdf.

[28] FTC, Brief as Amicus Curiae, *In re Lamictal Direct Purchaser Antitrust Litig.*, No. 14-1243 (3d Cir. Apr. 28, 2014), *available at* https://www ftc.gov/system/files/documents/amicus_briefs/re-lamictal-direct-purchaser-antitrust-litigation/140428lamictalbrief.pdf.

In addition to pay-for-delay, the Commission continues to review other strategies adopted by branded pharmaceutical companies that may have the effect of delaying or preventing generic entry. For example, we continue to be very concerned about potential abuses by branded pharmaceutical companies of safety protocols known as REMS—risk evaluation and mitigation strategies—to impede generic competition. REMS are a program implemented by a drug's manufacturer to provide safety measures for high-risk medicines. They can include special training for pharmacies and prescribers, the creation of patient registries, and tight controls on dispensing the drugs. The concern is that branded firms may use REMS-mandated distribution restrictions to inappropriately limit access to product samples generic drug developers need for bioequivalence testing, a predicate for FDA approval of generic drugs.

Another type of life cycle management strategy we are monitoring is so-called product hopping, where a brand introduces new, patented products with minor or no substantive improvements in the hopes of preventing substitution to lower-priced generics. The Commission has noted that the potential for anticompetitive product design is particularly acute in the pharmaceutical industry, in part because it may be a profitable strategy even if consumers do not prefer the reformulated version of the product or if it lacks any real medical benefit.[29]

3. Stopping Exclusionary Conduct by Health Care Firms with Market Power

The Commission recently announced a settlement with Cardinal Health, Inc. over charges that it illegally monopolized 25 local markets for the sale and distribution of low-energy radiopharmaceuticals.[30] The Commission's complaint alleges that for several years, Cardinal was

[29] FTC, Brief as Amicus Curiae, *Mylan Pharms., Inc. v. Warner Chilcott PLC*, Civ. A. No. 12-3824 (E.D. Pa. Nov. 21, 2012), *available at* http://www ftc.gov/sites/default/files/documents/amicus_briefs/mylan-pharmaceuticals-inc.et-al.v.warner-chilcott-public-limited-company-et-al./121127doryxamicusbrief.pdf.

[30] FTC News Release, Cardinal Health Agrees to Pay $26.8 Million to Settle Charges It Monopolized 25 Markets for the Sale of Radiopharmaceuticals to Hospital and Clinics (Apr. 20, 2015), *available at*

the largest operator of radiopharmacies in the United States and the sole operator in 25 metropolitan areas, and that it used that position to obtain exclusive rights to heart perfusion agents (HPAs), which are used to diagnose a range of medical conditions including heart disease. The Commission charged that, as a result of various tactics (including threatening to cancel purchases), Cardinal obtained *de facto* exclusive distribution rights from the two manufacturers with the only HPAs available on the market and prevented numerous potential competing radiopharmacies from buying these key inputs. The stipulated order, signed by a federal judge in New York last month, enjoins future misconduct and requires Cardinal to disgorge $26.8 million in ill-gotten gains due to inflated prices it charged to hospitals and clinics.[31] The money has been deposited in a fund for distribution to injured customers.

C. Maintaining Competition in Consumer Products and Services

The Commission continues to take action to preserve competition in economic sectors with the most direct impact on consumers' pocketbooks by promoting competition for everyday consumer products and services. The Commission seeks to preserve competition and ensure that anticompetitive mergers or conduct will not lead to higher prices or fewer options for basic household purchases.

Earlier this year, the Commission ordered the largest divestiture ever in a supermarket merger, requiring Albertsons and Safeway to sell 168 supermarkets in 130 local markets in Arizona, California, Montana, Nevada, Oregon, Texas, Washington, and Wyoming to settle

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https://www.ftc.gov/news-events/press-releases/2015/04/cardinal-health-agrees-pay-268-million-settle-charges-it. Commissioners Ohlhausen and Wright voted against accepting the proposed consent agreement. *See supra* note 7.

[31] *FTC v. Cardinal Health, Inc.*, No. 15-cv-3031 (S.D.N.Y.) (final order & stipulated permanent injunction, filed Apr. 23, 2015), *available at* https://www.ftc.gov/system/files/documents/cases/150415cardinalorder.pdf.

charges that their $9.2 billion merger would likely be anticompetitive.[32] According to the complaint, Albertsons and Safeway compete vigorously on the basis of price, quality, product variety, and services, and without the remedy, the acquisition would likely lessen supermarket competition to the detriment of consumers in 130 markets by removing a direct supermarket competitor. The Commission has also challenged a number of other supermarket transactions in recent years, including Bi-Lo Holdings' 2014 acquisition of 154 supermarkets from Delhaize Group, where the Commission required Bi-Lo to divest a number of supermarkets in Florida, Georgia, and South Carolina to FTC-approved buyers to resolve competitive concerns.[33]

Last year, the Commission authorized federal court litigation to stop a proposed $500 million merger between the two leading sellers of high school and college class rings, Jostens and American Achievement Corp.[34] We alleged that the transaction would have eliminated significant head-to-head competition between the companies, two of the three leading sellers of class rings, allowing the merged company to raise prices and reducing incentives to maintain product quality. The parties abandoned the transaction in response to the FTC's challenge.[35]

The Commission also challenged Service Corporation International's $1.4 billion acquisition of Stewart Enterprises, contending that the transaction would reduce competition for

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[32] *Cerberus Institutional Partners*, No. C-4504 (F.T.C. Jan. 27, 2015) (consent order), *available at* https://www.ftc.gov/enforcement/cases-proceedings/141-0108/cerberus-institutional-partners-v-lp-ab-acquisition-llc.

[33] *See Bi-Lo Holdings, LLC*, No. C-4440 (F.T.C. Feb. 25, 2014) (consent order), *available at* https://www.ftc.gov/enforcement/cases-proceedings/131-0162/bi-lo-holdings-llc. *See also AB Acquisition LLC*, No. C-4424 (F.T.C. Dec. 23, 2013) (consent order), *available at* https://www.ftc.gov/enforcement/cases-proceedings/131-0227/ab-acquisition-llc-matter.

[34] *Visant Corp.*, Dkt. No. 9362 (F.T.C. Apr. 17, 2014) (administrative complaint), *available at* https://www.ftc.gov/enforcement/cases-proceedings/141-0033/visantjostensamerican-achievement-matter.

[35] *Visant Corp.*, Dkt. No. 9362 (F.T.C. May 7, 2014) (order dismissing complaint), *available at* https://www.ftc.gov/system/files/documents/cases/140507vaisantjostensorder.pdf.

funeral and cemetery services in a number of markets.[36] To resolve those concerns, the merging parties agreed to divest 53 funeral homes and 38 cemeteries to preserve competition in 59 local communities. The FTC charged that the proposed deal would enable the merged firm unilaterally to raise prices charged to consumers in these local markets and would substantially increase the risk of collusion between SCI and the few remaining competitors in the affected local areas. The order also requires divestitures where the deal would likely affect competition related to specific ethnic and religious populations to ensure consumers in these communities will continue to have access to competitive funeral and cemetery services.

Finally, the FTC is currently before the federal district court here in Washington on a motion for a preliminary injunction to prevent the merger of Sysco Corporation and US Foods.[37] The Commission alleges that the proposed acquisition violates Clayton Act Section 7 by significantly reducing competition for broadline foodservice distribution services supplied to a wide range of customers, including restaurants, hospitals, hotels, and schools. Sysco and US Foods are, by far, the largest broadline foodservice distributors in the United States and combined would possess an alleged 75% share of sales to national customers. Moreover, the merging parties are the only broadline distributors with national coverage, operating numerous distribution centers throughout the country. The companies compete vigorously on the basis of price, selection, and service to meet the needs of customers with foodservice locations dispersed nationwide or across multiple regions of the country. The Commission's complaint alleges that the proposed acquisition would likely harm competition in the national market as well as 32 local

[36] *Service Corp. Int'l*, No. C-4423 (F.T.C. Dec. 23, 2013) (consent order), *available at* https://www.ftc.gov/enforcement/cases-proceedings/131-0163/service-corporation-international-stewart-enterprises-inc.

[37] *FTC. v. Sysco Corp.*, No. 1:15-cv-00256 (D.D.C.) (complaint filed Feb. 20, 2015), *available at* https://www.ftc.gov/system/files/documents/cases/150220syscousfcmplt.pdf. Commissioners Ohlhausen and Wright voted against filing the complaint in this matter.

markets, resulting in higher prices and diminished service. The Commission is joined in this action by the state attorneys general from 11 states and the District of Columbia.

D. Promoting Competition in Manufacturing and Technology Markets

Manufacturing and technology sectors also continued as high priorities for the FTC, including a number of recent enforcement actions to maintain competition in these crucial sectors of the economy. For example, in April 2014, the Commission successfully concluded its litigation challenging Ardagh Group's $1.7 billion acquisition of rival glass container manufacturer Saint-Gobain Container.[38] The transaction would have combined the second and third largest manufacturers of glass containers for beer and spirits, and resulted in higher prices for those products. In settlement of the charges, the Commission finalized a consent order requiring Ardagh to divest six glass manufacturing plants and related assets to a single buyer to create a strong, independent third competitor to replace the competition that would have been lost had the merger proceeded unchallenged.

In May 2014, the FTC issued a consent order to remedy competitive concerns arising from CoreLogic's $661 million proposed acquisition of DataQuick information systems.[39] The consent order requires CoreLogic to license its RealtyTrac assessor and recorder bulk data to preserve competition that would have been lost in this information market critical to the real estate industry. The FTC also took action to preserve competition in the market for title plants,

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[38] *Ardagh Group, Inc.*, Dkt. No. 9356 (F.T.C. July 1, 2013) (administrative complaint), *available at* https://www.ftc.gov/enforcement/cases-proceedings/131-0087/ardagh-group-sa-saint-gobain-containers-inc-compagnie-de. Prior to trial, the companies agreed to settle the charges with divestitures. *See Ardagh Group, Inc.*, Dkt. No. 9356 (F.T.C. June 18, 2014) (decision & order), *available at* https://www.ftc.gov/system/files/documents/cases/140618ardaghdo_0.pdf. Commissioner Wright voted against accepting the proposed consent agreement. *See* Dissenting Statement of Commissioner Wright, *available at* https://www.ftc.gov/system/files/documents/public_statements/568821/140411ardaghstmt.pdf.

[39] *CoreLogic Inc.*, No. C-4458 (F.T.C. May 21, 2014) (consent order), *available at* https://www.ftc.gov/enforcement/cases-proceedings/131-0199/corelogic-inc-matter.

databases of real property title information used by real estate title insurers to verify proper title and to facilitate the real estate lending process. The Commission's consent order requires Fidelity National Financial and Lender Processing Services to divest a copy of LPS's title plants covering certain local Oregon markets as well as an ownership interest in a joint title plant serving the Portland, Oregon metropolitan area.

In December 2014, the Commission challenged Verisk Analytics, Inc.'s proposed $650 million acquisition of EagleView Technology Corp., alleging that the transaction would likely reduce competition and result in a virtual monopoly in the U.S. market for rooftop aerial measurement products used by the insurance industry to estimate repair costs for property damage claims.[40] EagleView, the self-proclaimed "industry standard" in rooftop aerial measurement products, controlled about 90% of the relevant market, serving most of the largest insurance carriers. Meanwhile, Verisk owned the dominant software platform used by insurers to estimate rooftop property damage claims. Verisk had recently entered the market with measurement programs of its own and had succeeded in winning significant customers away from EagleView by providing a lower-cost alternative. Customers viewed the merging parties as the two closest substitutes for these products. After the Commission filed its complaint, the parties abandoned the transaction.[41]

E. Preserving Competition in Energy Markets

Few issues are more important to consumers and businesses than the prices they pay for gasoline to run their vehicles and energy to heat and light their homes and businesses.

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[40] *Verisk Analytics, Inc.*, Dkt. No. 9363 (F.T.C. Dec. 16, 2014) (administrative complaint), *available at* https://www ftc.gov/enforcement/cases-proceedings/141-0085/veriskeagleview-matter.

[41] *Verisk Analytics, Inc.*, Dkt. No. 9363 (F.T.C. Dec. 19, 2014) (order dismissing complaint), *available at* https://www ftc.gov/system/files/documents/cases/141219veriskeaglevieworder.pdf.

Accordingly, the FTC works to maintain competition in energy industries, invoking all the powers at its disposal—including monitoring industry activities, investigating possible antitrust violations, prosecuting cases, and conducting studies—to protect consumers from anticompetitive conduct in the industry.[42]

Mergers can significantly affect competition in energy markets, and the Commission's review of proposed mergers among energy firms is essential to preserving competition in these markets. For example, the Commission recently challenged a proposed acquisition involving two energy companies supplying gasoline in Hawaii. In an administrative complaint issued with a negotiated settlement of charges, the Commission alleged that Par Petroleum's acquisition of Mid Pac Petroleum would likely have substantially lessened competition in the bulk supply of Hawaii-grade gasoline blendstock—which is gasoline before it is blended with ethanol to make finished gasoline.[43]

Additionally, the FTC continues to monitor daily retail and wholesale prices of gasoline and diesel fuel in 20 wholesale regions and approximately 360 retail areas across the United States. This daily monitoring serves as an early-warning system to alert our experts to unusual pricing activity, and provides useful information to assist in investigations of potentially anticompetitive conduct. We also use the data generated by the monitoring project in conducting periodic studies of the factors that influence the prices that consumers pay for gasoline.[44]

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[42] Information regarding FTC oil and gas industry initiatives is available at https://www ftc.gov/tips-advice/competition-guidance/industry-guidance/oil-and-gas.

[43] *Par Petroleum Corp.*, FTC File No. 141 0171 (F.T.C. Mar. 18, 2015) (proposed consent order), *available at* https://www.ftc.gov/enforcement/cases-proceedings/141-0171/par-petroleum-mid-pac-petroleum. Commissioner Wright voted against accepting the proposed consent agreement. *See* Dissenting Statement of Commissioner Wright, *available at* https://www.ftc.gov/system/files/documents/cases/150318parpetroleumwrightstatement.pdf.

[44] For example, a 2011 report by the staff of the Commission's Bureau of Economics concludes that while a broad range of factors influence the price of gasoline, worldwide crude oil prices continue to be the main driver of what Americans pay at the pump. *See* FTC, Bureau of Economics, *Gasoline Price Changes and the Petroleum Industry:*

II. FTC Competition Research and Advocacy

Although law enforcement is the primary tool used by the Commission to promote competition and protect consumers, the policy tools of research and advocacy help us stay current with emerging trends in our dynamic economy, study business developments, and offer a framework to consider appropriate policy responses. In particular, the agency's research efforts, enhanced by its ability to obtain information under Section 6(b) of the FTC Act when conducting a study, ensure that the Commission has the data and information needed to make sound decisions, track market developments, and determine future priorities. It also allows the agency to play a vital role in the development of relevant legal standards and policies.

The Commission has two 6(b) studies underway. The first, which began last May, is a study of patent assertion entities (PAEs). Staff is now in the final stages of assessing the information collected, and the study should provide a better understanding of how PAE organization and activity may affect innovation and competition.[45]

Separately, the Commission has proposed to conduct a 6(b) study of its merger remedies,[46] to evaluate the effectiveness of Commission-ordered divestitures. It will enhance a similar study that the agency conducted in the 1990s, which led to important improvements to

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An Update (2011), *available at* http://www ftc.gov/os/2011/09/110901gasolinepricereport.pdf. *See also* Matthew Chesnes, FTC, Bureau of Economics, *The Impact of Outages on Prices and Investment in the U.S. Oil Refining Industry*, Bureau of Economics Working Paper No. 332 (2014), *available at* https://www ftc.gov/reports/impact-outages-prices-investment-us-oil-refining-industry.

[45] FTC News Release, FTC Announces Second Federal Register Notice with Revised Proposed Information Requests for Its Patent Assertion Entity Study; OMB Clearance Requested (May 13, 2014), *available at* https://www.ftc.gov/news-events/press-releases/2014/05/ftc-announces-second-federal-register-notice-revised-proposed.

[46] FTC News Release, FTC Proposes to Study Merger Remedies (Jan. 9, 2015), *available at* https://www.ftc.gov/news-events/press-releases/2015/01/ftc-proposes-study-merger-remedies.

the Commission's orders.[47] This study is in its preliminary stages, and we will soon seek OMB approval to collect data and information related to approximately 90 merger orders issued between 2006 and 2012. The Commission is committed to understanding and enhancing the effectiveness of its orders, and this study is a part of that ongoing effort.

Hosting workshops on emerging business practices and technologies is another example of how the Commission advances its competition mission. The FTC convenes fellow regulators and enforcement partners, as well as industry representatives, consumer advocates, and academics for lively, informative, and often groundbreaking discussions of the policy and enforcement challenges posed by current issues.

For example, in February 2014, the FTC hosted a workshop to examine emerging competition issues involving the introduction of biosimilars and interchangeable biologic drugs.[48] In particular, participants discussed how naming conventions may affect the development of biosimilar competition, with some raising concerns that the use of distinct non-proprietary names for biosimilars is unlikely to have a significant impact on drug safety but may well reduce competition. Additionally, earlier this year, the Commission, along with the Antitrust Division, held a two-day workshop examining emerging health care competition issues, including those raised by the regulation of health care professionals, innovations in health care delivery, advances in health care technology, the measurement of health care quality, and price transparency.[49]

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[47] FTC, *A Study of the Commission's Divestiture Process* (1999), *available at* https://www.ftc.gov/sites/default/files/attachments/merger-review/divestiture.pdf.

[48] FTC News Release, FTC to Host Workshop on the Competitive Impacts of State Regulations and Naming Conventions Concerning Follow-on Biologics (Nov. 8, 2013), *available at* https://www ftc.gov/news-events/press-releases/2013/11/ftc-host-workshop-competitive-impacts-state-regulations-naming.

[49] Information about the "Examining Health Care Competition" workshop is available on our website at https://www.ftc.gov/news-events/events-calendar/2015/02/examining-health-care-competition.

To address issues created by the proliferation of online and mobile peer-to-peer business platforms in certain sectors of the economy, next month the Commission will host a workshop on the "Sharing Economy." Peer-to-peer platforms enable suppliers and consumers to connect and do business and have spawned new business models in industries that have been subject to regulation, such as passenger transportation and public accommodation. As more entrepreneurs use technology to interact directly with consumers, we want to understand the competition, consumer protection, and economic issues created by the arrival of these new business models, as well as their interactions with existing regulatory frameworks.

The FTC also engages in advocacy, providing comments to state legislatures, state and federal agencies, and other policymakers. Advocacy is particularly effective in addressing market restraints imposed by government, often for reasons unrelated to competition and without due consideration of their impact on consumers. For instance, the FTC has been active in encouraging the removal of unnecessary scope-of-practice restrictions that prevent health care professionals from being able to take full advantage of their training and expertise.[50] Enabling professionals to practice to the full extent of their training and competence may reduce the price and increase the availability of professional services. FTC staff also submitted comments on legislative proposals in Missouri and New Jersey to expand prohibitions on direct-to-consumer auto sales by manufacturers.[51] The comments note that existing laws in those states protect

[50] *See* FTC, *Policy Perspectives: Competition and the Regulation of Advanced Practice Nurses* (Mar. 2014), *available at* https://www.ftc.gov/system/files/documents/reports/policy-perspectives-competition-regulation-advanced-practice-nurses/140307aprnpolicypaper.pdf.

[51] FTC News Release, FTC Staff: Missouri and New Jersey Should Repeal Their Prohibitions on Direct-to-Consumer Auto Sales by Manufacturers (May 16, 2014), *available at* https://www ftc.gov/news-events/press-releases/2014/05/ftc-staff-missouri-new-jersey-should-repeal-their-prohibitions. *See also* FTC News Release, FTC Staff Urges Michigan Legislature to Repeal Ban on Direct-to-Consumer Sale of Motor Vehicles by Auto Manufacturers (May 11, 2015), *available at* https://www ftc.gov/news-events/press-releases/2015/05/ftc-staff-urges-michigan-legislature-repeal-ban-direct-consumer.

independent dealers by mandating a single method of distributing automobiles, and that protection is likely harming both competition and consumers.

III. Conclusion

Thank you for this opportunity to share highlights of the Commission's recent work to promote competition and protect consumers. The Commission looks forward to continuing to work with the Subcommittee to ensure that our antitrust laws and policies are sound and that they benefit consumers without unduly burdening businesses.

Mr. MARINO. Thank you.

We will now go into the questioning. I recognize myself for 5 minutes of questioning. I'm going to hold to the 5 minutes for everyone on the dais.

So, with that, Assistant Attorney General, I will start with you, please.

The Department of Justice closed the public comment period for ASCAP or BMI consent decrees in August of 2014, and this is an issue this is very, very important to songwriters.

Could you please tell me what is the status of this review and a timeline, if you would, please.

Mr. BAER. Thank you, Mr. Chairman.

We are, at the Justice Department reexamining the ASCAP-BMI consent decrees to see whether they need to be updated in light of new technology, new ways in which people get access to music. It is a nonpublic law enforcement investigation, but we did—because we're talking about possibly amending public consent decrees—issue a notice, and give an opportunity for comment.

We received comment from over 250 different entities on these changes. My Chief Deputy, Renata Hesse, who is behind me, is in charge of the review. She assures me that it is proceeding expeditiously and that we are trying to sort through what updating is appropriate, whether there are problems with behavior that was agreed to in conjunction with these preexisting decrees. And while we are not ready to make an announcement yet, things are very much in progress and we are moving forward.

Mr. MARINO. A followup on that, please.

What are the key revisions, if you can share them with us, to the consent decrees that DOJ is currently contemplating? And I'm just going out on a limb here and assuming that, because of technology today, we definitely do need some type of change.

Would you please respond.

Mr. BAER. I'm delighted to respond.

And I think it's perhaps more appropriate to give a more detailed response for the record. I personally am not participating in that review because of clients I had when I was in private practice. So——

Mr. MARINO. Understood.

Mr. BAER [continuing]. Deputy Assistant Attorney General Hesse is handling the review. And if there is an ability for us to provide more information while this thing is ongoing, we are glad to do it in the form of a response to the question for the record.

Mr. MARINO. That would be very, very appreciated.

Mr. BAER. Thank you, sir.

Mr. MARINO. Commissioner Ramirez, if you would, please, there have been reports—excuse me. I want to jump to another question for you.

Last Congress, you maintained that the business community can gain sufficient guidance from the pleadings and settlements surrounding stand-alone section 5 prosecutions.

How can you be so confident that there is sufficient guidance contained in the documents surrounding the FTC's stand-alone prosecutions, particularly when these lawsuits rarely reach the Federal judiciary?

Ms. RAMIREZ. Mr. Chairman, as I explained when I testified on this issue the last time, in my view, the guidance that the agency has provided through its consent orders suffices to provide adequate guidance to the business community about what the touchstone is when we do bring stand-alone section 5 cases.

And, as I emphasized, it is an area where the Commission exercises considerable restraint. The vast majority of our actions are brought under the Sherman Act and the Clayton Act. It is only in limited instances that the Commission has acted using its stand-alone section 5 authority. The touchstone is that we don't act unless there is harm to competition or harm to the competitive process.

At the same time, I do understand that there is concern in the business community about whether the absence of more formal guidance by the Commission chills procompetitive conduct. In my view, I have not seen evidence to suggest that, nor have any companies come to visit me.

And I do have an open-door policy to address this issue or suggest that they have not been able to engage in procompetitive conduct as a result of failure to have more formal guidelines. It is an issue that we are thinking about at the Commission and we will continue to think about very seriously.

Mr. MARINO. Okay. I have 30 seconds here.

It is my understanding—and correct me if I'm wrong—it is possible for a staff member, a staff member, to initiate a conduct investigation against a company without a Commission vote. Is that true? And why is that so? Because, as a prosecutor, my staff did not initiate any investigations—and I was a United States Attorney—without my consent.

Ms. RAMIREZ. Mr. Chairman, there is significant management oversight over any investigation. But what does occur is that, as a preliminary matter, preliminary investigations can commence without a formal Commission vote.

If there is a significant concern that would lead to a more in-depth investigation at that point in time, the Commission would then issue a vote in order to authorize staff members to issue compulsory process and proceed with a full-phase investigation.

Mr. MARINO. My time has expired. I do have very severe reservations about that process.

With that, the Chair now recognizes the Ranking Member, Mr. Johnson, for his questioning.

Mr. JOHNSON. Thank you, Mr. Chairman.

General Baer, I have heard reports that three major Gulf airlines have received billions in subsidies from their governments over a multi-year period, which has allowed these airlines to massively expand their wide-body fleet of aircraft which they are using to penetrate U.S. airline markets with excess capacity, cheap seats, and amenities that no other airline can offer because they are not subsidized.

This is troubling and appears to raise questions concerning their use of their dominant positioning of key markets to eliminate competition. I would like your thoughts about it.

Mr. BAER. Thank you, Mr. Johnson.

I'm aware of the complaint that Delta, American, and United Airlines have filed with the U.S. Government. They obviously are entitled to a level playing field. And we have heard from a number of Members of Congress on this issue.

Right now the Departments of Commerce, Transportation, and State have asked for public comment on the concerns expressed by these three airlines and to evaluate the nature and extent of—arguable—unfair competition. And so we will get feedback. And we have offered our antitrust assistance to those three departments as they review the comments.

I think, keeping in mind these concerns expressed by these three U.S. airlines, we need to appreciate that what's happened in 20, 25 years of open skies is more consumers in the United States have more opportunity to fly to more places from more U.S. airports than ever was the case before. And what we don't want to lose sight of is the additional opportunity for consumers.

As I said at the beginning, these airlines, our U.S. carriers, are entitled to a level playing field, and we need to make sure that playing field indeed remains level.

Mr. JOHNSON. Thank you.

Ms. Ramirez, in June, a workshop on the sharing economy will be held and you will be considering whether existing regulatory frameworks are adequately responsive to sharing economy business models and protecting consumer protections. And this workshop will have both regulatory and antitrust implications, since it will examine the effects of regulations on marketplace competition and consumers.

Given this Subcommittee's ample jurisdiction over both of these issues, please discuss several of the regulatory topics that you anticipate will be discussed at the workshop.

Ms. RAMIREZ. I'm happy to, Congressman.

One of the very important functions of the Federal Trade Commission is to have both a research and policy function, and this workshop is an example of that.

Really, what we are trying to do here is to explore the growth that we have been seeing in products that are built on peer-to-peer platforms. Some of these new business models that we're seeing arise in the context of industries that have traditionally been regulated.

And the question that we're trying to explore is how existing regulatory models can apply to deal with appropriately legitimate health and safety issues while at the same time ensuring that there is sufficient competition and that there aren't entry barriers to new businesses.

So it really is an exploratory exercise. We are asking for public comments in advance of the workshop, and we will be addressing the various dimensions of competition and, also, legitimate health and safety consumer protection issues that we see in regulations.

And then, also, we will be seeking public comment following the workshop in an effort to enhance our understanding of these issues with a goal of being able to provide more informed advocacy, and then, if we do identify any competition problems, also to be able to take action.

Mr. JOHNSON. All right. Thank you.

And since we are kind of strapped for time, I'm going to yield the balance of my time.

Mr. MARINO. Thank you, Mr. Johnson.

The Chair recognizes the gentleman from Texas, the Vice-Chairman of this Committee, Mr. Farenthold.

Mr. FARENTHOLD. Thank you very much.

Mr. Baer, I understand the Chairman's concerns with respect to ASCAP and BMI, and I agree we need to take a look at it. But I have some very serious concerns about some of the proposed modifications to the consent decrees. That is easy for me to say.

How music publishers withdraw their rights from the decree regime, especially on the digital side, brings up several questions that I think need to be answered.

First, the proposed increase in transparency I think is critical. If it doesn't come on the front end, digital distribution service could potentially be exposed to massive liability that the publishers have exploited in the past. Just last year U.S. District Judge Denise Cote identified troubling coordination among the music publishers.

And while I understand your recusal limits your commenting on the situation, as part of what you send back to the Chairman, I would like to know explicitly what the DOJ has in mind to ensure that transparency enhancements will be fully operational before any rights withdrawal happens and that this partial withdrawal won't simply be used to enable further coordination between the publishers.

I would also like to enter into the record this article from The Hill, from the Digital Media Association laying out their industry's concerns with the proposed Consent Decree revision.

[The information referred to follows:]

THE HILL

May 11, 2015, 07:00 am

The Justice Department's musical quagmire

By Gregory Alan Barnes, contributor

Amid a flurry of proposed mergers and pending antitrust enforcement proceedings, the Justice Department has recently encountered a series of challenging issues. The ongoing dispute over music licensing reform may be the most difficult one this year.

That's because ASCAP and BMI, aided by their powerful music publishing affiliates, have mounted a sizable campaign to try to convince department officials to change how the right to publicly perform musical compositions is licensed.

Under the current system, businesses that perform music, such as AM/FM radio, television broadcast networks, local bars, restaurants, retail stores and online streaming services, all turn to ASCAP and BMI to satisfy the vast majority of their licensing needs.

By most accounts, the system works well.

Thanks to the existence of longstanding consent decrees, the licensing process is efficient, royalty rates are set at a reasonable price and similarly situated licensees are free from discrimination. The current licensing process has proven itself to be not only workable in the digital age, but also rather financially rewarding for both ASCAP and BMI.

In the most recent fiscal year alone, ASCAP reported revenues that exceeded the $1 billion mark, while BMI reported revenues just below that figure. Over the course of the past 10 years, these two entities have seen their annual revenues grow by approximately 50 percent each.

Despite these successes, ASCAP and BMI have recently pressed the department to make a series of changes to the way musical compositions are licensed. In particular, they have sought to eliminate the ability of online music services to utilize the traditional ASCAP/BMI licensing process — and the inherent protections provided under the existing consent decrees — in favor of the implementation of a less-structured, direct licensing regime. The department should rebuff these requests for several reasons.

First and foremost, the proposed changes are an obvious attempt to circumvent the federal rate court judges' authority to preside over an important class of future rate-setting proceedings. Not happy with the rate court's mandate to keep their considerable market power in check and set reasonable rates for the use of compositions, proponents are now looking for a newfangled way to charge online music services supracompetitive prices in a manner that would harm consumer interests. The department should be wary of such gamesmanship.

Currently, the performance royalties paid by online music services for their use of musical compositions are comparable, if not greater, than those made by competing radio platforms for similar uses. That is an important point that doesn't appear to be refuted by those seeking these changes. Instead, they tend to focus on the difference in payments made by online music services to record companies for their use of sound recordings, in comparison to those made to ASCAP and BMI for the use of musical compositions.

This comparison is not only misguided; it is entirely unfair.

Indeed, their entire campaign is aimed at raising the total content acquisition costs of the one small corner of the broadcasting industry that already pays more for its use of music than any other competing radio platform. Under such circumstances, it's hard to understand how any attempt to further this disparity could foster greater competition.

In years past, the Department of Justice has been steadfast in its commitment to promoting competition, protecting marketplace entrants and enhancing consumer welfare. In the wake of recent calls to modify the existing ASCAP and BMI consent decrees, the department should remind itself of the alleged anticompetitive behavior which gave rise to the initial agreements — as well as the troubling behavior more recently observed — and make a firm decision to stay the course.

Amid all the political pressure, it's no doubt a tough call to make. But it's the right thing to do.

Barnes is general counsel for the Digital Media Association.

TAGS: Department of Justice, Justice Department, DOJ, American Society of Composers, Authors and Publishers, ASCAP, Broadcast Music, Inc., BMI, Copyright collection societies, Music industry, Music licensing

Mr. FARENTHOLD. So can I count on you to get me that information?

Mr. BAER. Thank you, sir.

I will note that the public comment we issued specifically asked for views of folks on transparency, on selective granting of rights, on how the rate courts should behave, whether we need rate courts or should move to a mandatory arbitration system. And those are the issues that were subject to the 250 comments, and those are the very core issues that our team is looking at.

Mr. FARENTHOLD. Well, I look forward to following this issue. It is a big one for both sides on the equation.

Mr. BAER. Thank you, sir.

Mr. FARENTHOLD. And let's see. Where do I want to go next?

Chairwoman Ramirez, on March 13, the FTC approved a rule that sets a higher threshold for the Commission to continue administrative merger review cases after the FTC loses a preliminary injunction request in court.

Why did you all do this rule?

Ms. RAMIREZ. Let me clarify that it doesn't set or alter the standard. The Commission has always—if it loses a request for preliminary injunction in Federal court during the course of a merger challenge, it has always reviewed whether it is in the public interest to continue the administrative proceeding that is pending concurrently. That has always been done.

What the rule change did was that it addressed some apparent concerns and confusion in the business community about—it goes back to a rule that we had in place prior to 2009.

Mr. FARENTHOLD. So under the SMARTER Act, the FTC would be required to pursue injunctions against proposed mergers in court rather than through the administrative process.

Why is the FTC opposed to pursuing these cases in court, particularly in light of the Antitrust Modernization Commission's recommendation that administrative litigation does not make sense in the context of merger reviews?

Ms. RAMIREZ. Congressman, I think that that aspect of the proposed SMARTER Act really goes and undermines one of the central strengths of the Federal Trade Commission and one of the reasons that the Federal Trade Commission was created in the first instance, which was to have an expert body of bipartisan commissioners rule on and develop antitrust doctrine.

And, in my mind, that system has worked well for over 100 years now. I think our appellate record—which, if you look over the course of the last 20 years, we have won in the antitrust arena 11 out of the last 13 appeals.

If you consider the sharing case a win because the Commission's position was vindicated in the activist case, that record, I think, speaks for itself. And to undermine the ability of this expert body to develop antitrust doctrine would be, in my mind, a mistake.

Mr. FARENTHOLD. All right. Finally, the FCC has been doing a lot lately with respect to net neutrality. It seems like the evil that net neutrality is designed to prevent, that is, dominant Internet service providers using their market share to block or limit access to certain types of material potentially from a competitor, is just

the type of behavior both consumer protection laws that the FTC administers as well as antitrust laws deem to prohibit.

Would either of you all like to comment on where this fits or does not fit and why we would need to go to additional regulations with the FTC. Why couldn't you all do it?

Mr. BAER. If I may, Mr. Farenthold, antitrust clearly has a role in preventing abuse of the way in which content is developed, put, and brought into consumers' homes through Internet service providers and through wireless carriers.

But there is value, too, to have prospective certainty. If a Silicon Valley developer with a great idea knows how he or she is going to get information into that pipeline and can be confident it will be treated the same as content provided by NetFlix or someone else, we are going to get more investment.

If Internet service providers know what the rules of the game are in advance, they are going to be able to observe those rules and ensure that consumers get high-speed access to this tremendous program.

Mr. FARENTHOLD. I'm way over my time. I appreciate your answer. I may disagree with you. But thank you very much.

Mr. MARINO. The gentleman's time is expired.

The Chair now recognizes the Ranking Member of the full Judiciary Committee for his questioning.

Congressman Conyers.

Mr. CONYERS. Thank you, Chairman.

General Baer, I keep reviewing the American Airlines-US Airways merger, and I'm not as enthusiastic about it as some people are, maybe even you. Let's go over this.

Were slots awarded to low-cost carriers? And were fares on key routes cheaper as a result? To what extent could you assert that the consumers have many benefits, sir?

Mr. BAER. Thank you, Mr. Conyers. I know we talked about this the last time I was up here.

Mr. CONYERS. Sure.

Mr. BAER. It was the day after we had announced that settlement.

The preliminary indications from the settlement we entered into in November of 2013 are that, in fact, low-cost carriers have dramatically increased their offerings out of DCA, out of Reagan National. There are 40 new flights on bigger equipment. 13 new cities are being served. Love Field was just opened up as the Wright Amendment expired.

There has been new service offered by Southwest and by Virgin Atlantic, which got opportunity to 2 of the 20 gates available at Love Field. There's new service into Dallas from San Francisco, Los Angeles, DCA, LaGuardia. There's a new form of competition that's been——

Mr. CONYERS. What about lower fares?

Mr. BAER. The data on lower fares are not in yet. DOT collects this information, but there is a time lag. And we have a team set up to evaluate where we are with respect to fares.

But by giving companies like Southwest, like Virgin America, which compete on a different model—Southwest doesn't have a bag

fee—there are indications that consumers are benefiting from the divestitures we required.

Mr. CONYERS. Well, give us some of the results after you finish reviewing it, please.

Mr. BAER. Pleased to, sir.

Mr. CONYERS. Madam Chairwoman, welcome.

I'm worried about the SMARTER Act and what it has done in the adjudication authority in merger cases. I think it has been an, obviously, weakening.

How do you assess its effect in terms of the policy that FTC promotes?

Ms. RAMIREZ. Congressman, this proposed legislation is something that I do oppose. As I was mentioning earlier, the reason for that is that I think it undermines a central component of what is a core strength of the FTC, and that is our ability to develop antitrust doctrine using our administrative process and acting in our quasi-judicial role.

I think that we have done a very good job of protecting American consumers, clarifying important antitrust doctrine, and I think the evidence of that is, if you look at our appellate record, I highlighted in my opening remarks——

Mr. CONYERS. There have been some victories.

Ms. RAMIREZ. Yes.

Mr. CONYERS. Well, that's good.

And I take into consideration that there have been so many decades of lax enforcement that there is a lot of catching up to do. I mean, you can't come in there and straighten things up and tidy things around quickly.

Let me ask you both this last question and your comments. Given the accumulating evidence of the adverse effect of mergers over decades of lax enforcement, don't you think that we should conduct more reviews to study the effects of the already-consummated mergers and what has resulted from that? Can I ask you both that before we leave?

Mr. BAER. Absolutely, Mr. Conyers.

I think sound antitrust enforcement includes being willing to look back and see what you have learned. And we have learned in various markets some of the representations merging parties made to us about how much better the world will be, cost savings, no price increases. Sometimes those representations have proven not to be exactly correct, and that's a bit of an understatement.

And so part of our job is to learn from past inquiries. And where we have allowed a merger and it doesn't seem to have worked out, that skepticism is fully applied to the next matter that comes before us, and it should be.

Ms. RAMIREZ. Let me just add briefly that I concur with the remarks that Mr. Baer has made. The FTC just recently launched a remedy study during which we will be looking back at the effectiveness of our orders, given, of course, the importance of merger review and analysis.

Mr. CONYERS. Well, I thank you both.

And I yield back.

Mr. MARINO. Thank you.

The Chair now recognizes the Chairman of the full Judiciary Committee, Chairman Goodlatte.

Mr. GOODLATTE. Thank you, Mr. Chairman.

I will direct this question to both of you. And, again, thank you for being here and for your testimony.

On February 26 the FCC passed its Open Internet Order which classifies broadband Internet access under Title II of the Communications Act. Two Supreme Court Cases, Trinko and Credit Suisse, call into question whether an antitrust claim can survive against an entity that is heavily regulated.

So in light of these decisions, how will the FCC rule impact each of your antitrust enforcement agencies' ability to prosecute antitrust violations by any entity that is regulated under Title II?

Mr. BAER. I'm privileged to go first, Mr. Chairman.

We have looked very hard at the invocation of Title II by the FCC, but because they forebeared—if that's the right use of the term—on much of Title II, we do not think it will have an impact on the Antitrust Division's ability to look hard at both behavior and at mergers in this sector.

I should note that the United States Government is a statutory respondent when someone appeals an FCC order. So the FCC lawyers will be defending, and in addition, the Antitrust Division will be defending the interests of the executive branch, the United States Government. So we are going to need to look hard and closely at the arguments, and they are clearly going to be appealed.

Mr. GOODLATTE. But that very structure that you just described where both you and the FCC team up against some business that you are claiming has violated some open access issue is the very reason why the Supreme Court issued its opinions in Trinko and Credit Suisse. They said, if you regulated industry, you have got to be very careful about what antitrust standards you impose against it as well.

As you know, I'm a strong advocate of your antitrust authority to keep the Internet open, and I'm very concerned that what is going to happen here is that, as the FCC ramps up—and, yeah, they have started with what they claim is a light touch—but they will ramp up, and, as they do, your authority is going to be diminished. And I think your authority is the more effective one.

Ms. Ramirez.

Ms. RAMIREZ. Let me address one issue that impacts the FTC specifically, and that is the issue of the common carrier exemption to our jurisdiction.

The Open Internet Order reclassifies broadband service as a common carrier service. A unanimous commission would seek appeal of that exemption. And we do urge Congress to eliminate that because, in our view, the common carrier exemption to our jurisdiction no longer has a valid role in today's world.

And, in particular, I note that this impacts the consumer protection work that we do. So if I may put this in your minds, I would hope that Congress would take action to eliminate that.

Mr. GOODLATTE. So your solution would be that we should buttress the FCC's regulation of the Internet and, instead, back off of the FTC's role here or try to go around the Supreme Court decisions and say, "You can have your cake and eat it too" by allowing

you to be able to use your FTC authority at the same time that they regulate the Internet?

Ms. RAMIREZ. I share Mr. Baer's view of the application of Trinko. I do think that, in order to have robust and adequate protection, in certain instances it does make sense to have the FTC use its enforcement authority, particularly——

Mr. GOODLATTE. I think in——

Ms. RAMIREZ [continuing]. As regards consumer protection.

Mr. GOODLATTE. I think in many instances it is important for the FTC to have that authority, and I think it is going to be impaired by the FCC's action. That's why there is such a negative reaction to this by many of us here in the Congress.

Recently Commissioner Wright announced that he proposed several definitions of the Federal Trade Commission's section 5 standalone authority for a vote within the Commission.

I've heard you testify this morning and in your statement that you think that the lack of specificity in those standards that you have now and pointing us toward actions taken as guidance as opposed to clear written guidance is sufficient. I question that.

But what is the status of those proposals from Commissioner Wright? And are you willing to work with your fellow Commissioner on reaching a consensus definition?

Ms. RAMIREZ. So let me just clarify my position. I believe that the stand-alone authority can be developed using case-by-case development in the same way that the antitrust rules have evolved over time.

In specific response to your question, I'm afraid that I can't get into our internal Commission deliberations. But what I can tell——

Mr. GOODLATTE. Can you at least tell us if you are willing to work with him?

Ms. RAMIREZ. What I can tell you is that these are issues that we are discussing, and I take very seriously the concerns that you've raised and that the others in the business community have raised.

Mr. GOODLATTE. Okay. And then, finally, on March 19 of this year, The Wall Street Journal reported that the FTC had inadvertently disclosed a portion of the Bureau of Competition's recommendation to the Commission regarding the Google search investigation that had been closed for over 2 years.

What steps have been taken to prevent these types of occurrences in the future?

Ms. RAMIREZ. Let me say that—first, that we regret that inadvertent disclosure. We have conducted a complete review of our procedures and put in place several steps to ensure that this does not occur again.

Mr. GOODLATTE. How has this disclosure impacted companies' willingness to provide information voluntarily to the Commission?

I mean, part of your ability to be effective is to have companies entrust you with confidential information that they then will know will impact the decision that has made, but also will know that it won't be disclosed.

Now here it is 2 years after the case is closed and it is disclosed. Are they going to be as willing to cooperate as they have in the past?

Ms. RAMIREZ. There's no question, Mr. Chairman, that this has been an unfortunate situation for the agency. It's vital for us to protect the confidential information of the parties that provide us with information regarding marketplace conditions.

And, again, we regret that this occurred. I assure you that we have done a very thorough review and put in place a number of different steps to ensure that this does not happen again.

Mr. GOODLATTE. Thank you.

Thank you, Mr. Chairman.

Mr. MARINO. Thank you.

Before we go and vote, the Chair is going to recognize the congresswoman from Washington, Ms. DelBene.

Ms. DELBENE. Thank you, Mr. Chair.

And thanks to both of you for being with us today.

In the age of the Internet economy now, we have different business models that are challenging old notions of what is viewed as anticompetitive behavior.

In antitrust cases, you, of course, need to define the market you are dealing with before you can start to consider whether a company might be violating antitrust laws with respect to that market, but Internet companies today are engaging with consumers through many different market channels and constantly testing and evolving new services for their users. Companies that didn't compete before now are competing in different ways.

Could you each outline for me kind of how your teams are adapting to what might be called an increasingly amorphous market, marketplace, and what challenges you see in carrying out your missions going forward, given these changes.

We could start with you, Attorney General Baer.

Mr. BAER. Thank you.

The antitrust laws, as Chairwoman Ramirez said a second ago, are flexible enough that we feel confident that we can apply those basic standards to emerging technologies, and we do.

We have workshops to study. We have brought in people with high-tech expertise. Even though things are fast-changing, there still is the ability of companies to become near monopolists to enter into acquisitions which injure consumers.

Most recently we brought a criminal case where two firms conspired to adopt the same algorithm, so when someone goes on Amazon search to look for a price for this product, the price would pop up as exactly the same. It was price fixing through algorithm on the Internet.

So we are alert to, vigilant in, pursuing behaviors, whether they're online or a smokestack industry that have the potential to injure consumers.

Ms. DELBENE. Chairwoman.

Ms. RAMIREZ. I concur with the views that have been articulated. I also agree that the flexible principles that we have I think can be applied to today's dynamic markets.

I think the challenge lies in our ability to conduct thorough investigations as efficiently as possible so that, if action is needed, we can take appropriate action in a time that makes sense.

Ms. DELBENE. Even when we have companies that might have very different business models may eventually be competing in the

same marketplace, but in very, very different ways, you still are able to——

Ms. RAMIREZ. I believe that we still have an ability to monitor these new dynamic marketplaces. Again, the challenge becomes in how quickly we can take action while at the same time ensuring that we provide appropriate process and be as thorough as we need to be. But, in my mind, we can certainly be effective, notwithstanding the dynamic nature of the markets.

Ms. DELBENE. Attorney General Baer, I wanted to ask you if you might comment on the Antitrust Division's early recognition of the pro-competitive benefits of ensuring availability of low-frequency spectrum for smaller providers and, you know, kind of what is your position relative to the FCC and what they have been focused on recently.

Mr. BAER. The FCC has an active rulemaking or proceeding going on to allocate this high-value, low-frequency spectrum to wireless carriers.

We have filed comments on the public record suggesting that one of the factors the FCC appropriately should take into account is the impact on competition and local markets, that no one or two wireless carriers should be able to get to the position where they dominate wireless availability in a local area and effectively make it impossible for smaller carriers to compete.

So we are supportive of a level playing field and appropriate guidance to the potential bidders for that high-value frequency to make sure that we aren't creating antitrust problems over the long run that will have your constituents and others around the country paying more for wireless service than they would if the market were more competitive.

Ms. DELBENE. Thank you very much.

And thank you, Mr. Chair. I yield back.

Mr. MARINO. Thank you.

I am going to squeeze Mr. Issa in for questioning. And the rest of the panel is welcome to head to the floor and vote. And as soon as Mr. Issa's done, I will do a run over to the floor to get my vote in.

Mr. ISSA. Thank you, Mr. Chairman. Thank you for your willingness to jog with me.

Madam Chair, I do have a number of questions on the section 5 authority, but let me just concentrate for a minute on that and then move on.

First of all, I would like to ask unanimous consent at this time that the Tiversa report be placed in the record.*

Mr. MARINO. Without objection.

Mr. ISSA. Thank you.

Section 5 authority, as you mentioned—one of your Commissioners, Mr. Wright, clearly is proposing that there be a standard.

Leaving that alone as to what the standard would be, isn't it reasonable for us to see from this side of the dais that, if there is no standard and the staff is not bringing you votes on particular

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***Note:** The submitted material, a report titled "Tiversa, Inc.: White Knight or Hi-Tech Protection Racket?" is not printed in this hearing record but is on file with the Subcommittee and can be accessed at: *http://docs.house.gov/meetings/JU/JU05/20150515/103472/HHRG-114-JU05-20150515-SD003.pdf*.

events, then, by definition, the staff is making decisions without specific guidance and you are abrogating what should be your authority?

And I will just put a question in this specifically. Until you have specific standards on which to judge, shouldn't the Commission have to be informed and, as appropriate, vote before these actions go forward based on what is effectively less-than-sufficient guidance?

Ms. RAMIREZ. Let me address two issues here, and I want to be very clear. First of all, I don't think it is accurate to say that there is no standard. There absolutely is a standard, and the standard is whether conduct by companies has an adverse impact on either competition or on the competitive process. I think that's been very clearly established——

Mr. ISSA. But you use section 5 authority when somebody simply gets hacked and their data's out there based on, "They are not using a sufficient care," on which you have no standard.

Ms. RAMIREZ. So let me clarify. What you're talking about has to do with our consumer protection authority, which relates to something separate from our unfair methods and competition authority. There we are exercising our authority under section 5, which bars deceptive or unfair practices.

Mr. ISSA. Right. But I want to focus this.

Tiversa, the LabMD case, which was a data breach, which was, if you will, failure to maintain personal identifiable information, used your section 5 authority. We followed that case.

So you are clearly using an authority for data breaches and——

Ms. RAMIREZ. We are. We're using——

Mr. ISSA. Okay. So now——

Ms. RAMIREZ [continuing]. Protection authority——

Mr. ISSA. Now that we have established you are using—because I have very limited time.

Ms. RAMIREZ [continuing]. Which is different from what Mr. Wright is——

Mr. ISSA. Yeah. No. I understand. I understand. But I want to stay on section 5 authority and the examples that I have put in the record.

Ms. RAMIREZ. Yes. All of this is within section 5. Let me clarify.

Mr. ISSA. So, now, back to section 5, you also don't have a standard for, if you will, the safe haven for data protection. You have no outside group that sets standards. You have no specific standards.

So your standard for going after a company that has a data breach is they have a data breach. Isn't that true?

Ms. RAMIREZ. No. That's absolutely not true.

Mr. ISSA. Okay. If they don't have——

Ms. RAMIREZ. We——

Mr. ISSA [continuing]. A data breach, have you done——

Ms. RAMIREZ. We have broad over——

Mr. ISSA [continuing]. Any section 5 actions for data breaches?

Ms. RAMIREZ. I'm sorry?

Mr. ISSA. If there is no leaking of personally identifiable information, you don't go after them. When you find out they do, you go after them. And, yet, you have no standard where someone can say,

"If I do this," "If I hire this company," "If I am ISO 9002," "if I am" whatever, "it is a safe haven."

So let me go through this process for a moment. In the case of many of your enforcements that we have been monitoring, what happens is the data breach itself becomes the evidence and, at the end of the day, they enter into consent decrees because they want you off their back not because they know exactly what they should have done to have not had it.

In the case of Tiversa or in the case of a case that you passed on—and I appreciate that you passed on it—it was a free AIDS clinic in Chicago who had a data breach that turned out to be based on a stolen laptop, the result of a breaking and entering, that then Tiversa informed you about, that then Tiversa informed their lawyer about, that then that lawyer sued by getting those AIDS patients all riled up and suing the AIDS clinic.

So as we go through this, the question I have for you is: Until or unless you have a standard of care for a breach before it happens so that people know that, if they assert this, they have a safe haven, which we do in antitrust in most other areas—you can define it—shouldn't your focus switch to those who mine data, those who hack, those whose use of somebody else's data, in fact, is inappropriate, rather than those, for better or for worse, who get hacked?

And I will close with this. You don't have the authority to go after the State Department, the Veterans Administration, Congress, or any of these other government agencies, all of whom have had massive data breaches.

Why is a data breach in your focus? Is it just because the breached company is easy and the hacker is hard?

So whatever time the Chairman will allow for you to answer.

Ms. RAMIREZ. If I may.

Mr. MARINO. Yes, please.

Ms. RAMIREZ. So I want to clarify that we do have a standard when it comes to enforcement actions in the area of data security. Companies are required to, under section 5, have reasonable security measures in place to protect consumer information. So that's——

Mr. ISSA. That standard has been——

Ms. RAMIREZ. And we——

Mr. ISSA. We have asked for it, and you haven't published anything other than those words.

Ms. RAMIREZ. We absolutely have a standard where we use both under deception as well as unfairness.

Mr. ISSA. Well, we will follow up with any additional information you can give us to show where a company can know a safe haven so it can be published and they can know what they need to do to be immune if there is a data breach and they have met that standard.

Ms. RAMIREZ. And I would be happy to supply both. We have more than 50 cases in this area. We have guidance. And we're continuing to provide even more guidance to companies.

Just one more very short point, and that is that I also want to make clear that no investigation at the FTC is commenced without senior management supervision and there won't be any conduct

remedy that is imposed or any remedy of any kind that's imposed without a Commission vote. So I want to clarify that point.

Mr. MARINO. Thank you.

We will go into recess to vote. With my apologies, we are going to be at least 40 minutes.

[Recess.]

Mr. MARINO. The Committee will come to order.

Again, thank you for your patience. I apologize.

The Chair now recognizes the gentleman from New York, Congressman Jeffries.

Mr. JEFFRIES. I thank my good friend and distinguished Chair from the great state of Pennsylvania.

And I thank the distinguished panelists for your service and for your presence here today.

Let me start with Chairwoman Ramirez. We, as the Judiciary Committee, have been undertaking an effort to deal with the patent troll phenomenon and to strike an appropriate balance in terms of our litigation system in making sure that all actors have access to, you know, vindicate their rights pursuant to legitimately held patents, but that the process is not abused in a way where you have a situation where some defendants are forced to make decisions with respect to resolution not based on the underlying merits of the claim, which is what should be the case, but based on the high cost of litigating the matter even if, ultimately, they think they will be successful.

And so we are hopefully moving toward closure as it relates to that process where we can get a product out of the House and the Senate and to the President's desk. But one aspect that we have not addressed, I gather, for jurisdictional reasons in terms of the Judiciary Committee side is the demand letter phenomenon. And I know that is something that you have been working on.

And if you could just speak to what your efforts have been and what your thoughts are as it relates to dealing with demand letter overreach, on the one hand, but also recognizing that it can also be a legitimate vehicle pursuant to pre-litigation settlement discussions.

Ms. RAMIREZ. Absolutely. And I am happy to address that question. And I do think that we have to be careful to ensure that any efforts at reform in this area carefully balance the rights of IP holders as well as those who are legitimately implementing technology.

This is something that we have been looking at very closely at the FTC, and we certainly stand ready to use our consumer protection authority in this area so that, if there are any practices that are deceptive, we will take action.

In fact, last year we did take action against one particular entity, a patent assertion entity, that we alleged was acting deceptively in sending out thousands of demand letters to small businesses around the country. So it is something that we care very deeply about, and we are monitoring the arena vigilantly.

And with regard to particular legislation, I will say that I generally believe that our current authority is adequate to address the situations where you do have deceptive conduct that's involved, but

at the same time, we're certainly happy to work with Congress in connection with particular legislation in this area.

Mr. JEFFRIES. If you can speak to the issue of what was the outcome—or what is the present status of the action that was taken with respect to that particular patent assertion entity?

Ms. RAMIREZ. So we resolved it, and we basically imposed a cease and desist order that prohibits this entity from engaging in similar unlawful conduct in the future.

Mr. JEFFRIES. Okay. Thank you.

And, Mr. Baer, you noted in your testimony that airline competition is vital to the American consumer, and you indicated that you have been pleased with the efforts by the Department of Justice in terms of ensuring the broadest possible competition within the law related to the airline industry. If you can just, you know, add some color and context to that assessment.

Mr. BAER. Sure, Mr. Jeffries. Thank you for the opportunity.

Essentially, what we have had is consolidation over a number of years in the industry. When we took a look at the U.S. Air-American merger and we filed suit to block it, part of what we said in that complaint is that the three legacy carriers, now three after U.S. Air and American combined, seemed to be engaged in behavior that was not fiercely competitive, not what we expect of markets that are fully functioning.

And in trying to figure out what best to do, we made the conclusion that allowing the merger, but giving up gates and slot rights at capacity-constrained airports where the different players, the discount carriers, the low-cost carriers, were actually coming in and driving fares down was the best way to improve what was not a terrific competitive dynamic.

I can't tell you it's day and night. Mr. Conyers was really raising that question with me earlier. But we are seeing improvement, more flights to more places in airports that previously had been basically dominated by Delta, United, and American. So there is improvement, and we are pleased to see it.

Mr. JEFFRIES. If the Chair would just indulge a brief follow-up.

Mr. MARINO. You may have all the time that you would like, Mr. Jeffries.

Mr. JEFFRIES. Thank you.

And I would just urge the Department of Justice and the antitrust shop to continue to closely monitor, you know, the issue, particularly as it relates to pricing, because it does seem, based on concerns that have been articulated to me by many of my constituents—and I have got JFK in the immediately adjacent district that I represent—that, amongst the major airlines, the prices don't seem to differ significantly in a way that would suggest that there is real competition.

And then there was also significant concern that, as we experienced toward the end of last year and earlier this year a dramatic decline in fuel prices, that there was no similar impact on airfare. And one might expect, in fact, that some of the benefits of the reduced fuel costs would be transferred to consumers, and there was no evidence that that took place. And I would just urge the Department of Justice to do what they can to continue to monitor the situation aggressively.

Mr. BAER. You have my commitment.

Mr. JEFFRIES. Thank you.

Thank you, Mr. Chair.

Mr. MARINO. Thank you.

I am going to have one more question, and the Ranking Member is going to have another question, because I sort of feel a little guilty making you wait almost an hour and then saying we are done with you. Do you mind if we do that? Okay.

I am going to defer to the Ranking Member.

Mr. JOHNSON. Thank you, Mr. Chairman.

Attorney General Baer, in its brief, the Antitrust Division—well, let me start. First, arbitration agreements are pervasive in society, affecting countless Americans every year. This issue has concerned me since I first introduced legislation to prohibit forced arbitration agreements back in the 110th Congress.

As I mentioned in my opening statement, the brief for the United States in Italian Colors noted that private actions are important to supplementing the government's civil enforcement efforts under the antitrust laws as administered by both the Justice Department and the FTC.

Attorney General Baer, in its brief, the Antitrust Division argued alongside the Solicitor General that the United States has a substantial interest in ensuring that arbitration agreements not prevent the redress for violations of Federal statutory rights, including those enumerated by the antitrust laws.

In the wake of Italian Colors, how has the court's decision affected the ability of antitrust plaintiffs to enforce important statutory rights in court?

Mr. BAER. Well, the reason the Justice Department, the Antitrust Division, took the position it did in Italian Colors, a position that did not prevail in the Supreme Court, was concern that the imposition of mandatory arbitration rights on consumers could limit their access to the courts and, basically, result in an imbalance in disputes between consumers and big business.

But Italian Colors is the law of the land, and it is an adjustment that private plaintiffs and their lawyers are seeking to address going forward. It is an imperfect world in which we operate, I am afraid.

Mr. JOHNSON. Basically getting adjusted to the fact that forced arbitration is the reality?

Mr. BAER. Yes, sir. And I appreciate the concerns that underlie the legislation you are sponsoring.

Mr. JOHNSON. Thank you.

I yield back.

Mr. MARINO. Thank you.

General, I wanted to ask you a question about the international antitrust enforcement actions, if you would, please.

There have been reports that China is using its antitrust laws to advance its own industrial policies—and I actually just read another report that was even more descript about this—at the expanse of intellectual property rights, particularly rights of American companies.

How does DOJ—as a matter of fact, FTC can respond to this as well—coordinate with other executive agencies on issues of international antitrust enforcement?

And I am just going to throw out another follow-up question that you will probably answer anyhow.

To have foreign countries applying antitrust laws in protectionist manners, how does your agency and each other agency respond to address the issue as well?

Mr. BAER. Let me give sort of three levels of answer.

First, there is a very active process within the executive branch to make sure these issues are identified and presented at the highest levels. When President Obama went over to meet the president of China in November, that was on his agenda, fair, non-discriminatory enforcement of the antitrust laws.

There's been follow-up at secretary-level meetings between senior officials of the Chinese Government, vice premier level, and senior officials in the Obama administration to make sure that we get commitments from those agencies that enforce the Chinese antimonopoly law, that they will do so in a fair and transparent and non-discriminatory fashion. We have received some of those assurances, and we are hopeful that they will be honored.

The third level is the two of us are extraordinarily committed to working with the antimonopoly law enforcers. There are three agencies over there. You think it is interesting that there are two here. Well, there are three over there, and we work with all three.

We have been to China. We have met with their senior leadership. The head of their merger enforcement agency will be in town next week. The two of us are meeting with him in my office on Monday morning to talk about these issues, talk about remedies, talk about fairness.

So it is very much a priority for this Administration and for the antitrust enforcers in the United States.

Mr. MARINO. Recently I just read an in-depth article, a report, actually, about China flexing its muscle with U.S. companies on what China's calling antitrust issues concerning their laws.

And in return for not pursuing things further, it is, to me, arm-twisting with these companies, saying:If you give us licensing to something that we are interested in, if you give us the right to perform any testing or research needed here in our country and in our laboratories, we will forego any further, for the lack of better term, general prosecution or fines or even as much as removing the company from the country.

What say you about that?

Mr. BAER. Well, it is a concern. We've heard from U.S. business interests. We've met with U.S. companies that have those concerns to make sure we understand. Where we think it appropriate, where we think the concern is legitimate, we've communicated those concerns to our counterparts in China.

At the risk of being controversial, not all complaints that one hears from U.S. companies or foreign companies are automatically three-dimensional, valid, take everything into account.

So one of the things we try to do is sort through what we think appears to be a legitimate concern on the part of a U.S. company and communicate that. To the extent we think it is appropriate en-

forcement, the sort of enforcement actions we would take here, we let the companies know.

So we're trying to nuance this and encourage the—I said in my prepared testimony one of the things that we export well from the United States is sound antitrust competition policy. It is a big item of commitment for the both of us and our teams.

Mr. MARINO. It is a complex tightrope to walk. And can you give an example of how we are attempting—other than through negotiations, what we can use sometimes as a hammer over their heads, saying, "If you continue this, these repercussions may occur."

Mr. BAER. As antitrust enforcers, I think we don't have many hammers.

Mr. MARINO. Right.

Mr. BAER. And it would be inappropriate, I think, as a law enforcement function, to threaten retaliation that is not on the merits. Right?

Most countries that we work with that are developing antitrust enforcement regimes want to be respected. They want to be fair. There is a temptation, as new laws develop, maybe to tilt the playing field in favor of the home team. And where we think that is going on, we communicate it.

Many of these communications are bilateral and confidential. We want to respect their process, encourage them to aspire to international norms of good competition enforcement. And that is a large part of what we do. It is below the radar, as is appropriate when law enforcement officials are talking to one another.

Mr. MARINO. I do think also another method could significantly improve the situation if—and I am sure this goes on to a certain extent—other countries joined with the U.S. to suggest to China that this could hurt your reputation around the world as far as being a trading partner.

Mr. BAER. It is helpful. And we work with our counterparts. A great example is the European Union, who also have a strong bilateral relationship.

And we share concerns and are transparent with one another about our discussions, whether it be with China, India, any competition authority which is beginning to develop an enforcement regime.

Mr. MARINO. Thank you.

Commissioner, do you have any response to any of my questions pursuant to this?

Ms. RAMIREZ. I echo the same comments that Mr. Baer has made. These issues are very important. We do engage on an international level. And we think that it really impacts, you know, the legitimacy of international enforcers around the world when fair processes aren't used during the course of investigations and when actions are taken that are not supported by sound evidence showing anticompetitive conduct.

So these are messages that we've been communicating internationally. We've been communicating them on an individual basis with counterparts not only in China, but in other parts of the world.

And as part of our multilateral efforts, in fact, we work a great deal with something called the International Competition Network.

And we have just produced some guidance on investigative procedures that, in our mind, are important and good best practices to utilize during the course of antitrust investigations.

So these are important issues, and we're certainly keeping an eye on them.

Mr. MARINO. Good.

I have one more question for you, Commissioner, but I would like if you could send it to us in writing. And I'm just going to read it for the record, but we will submit to you the question in writing so your staff doesn't have to sit back there and start writing everything down.

At this Committee's last oversight hearing in November of 2013, I personally asked you about the merger between Express Scripts and Medco. I was concerned that it may lead to anticompetitive effects within the pharmacy market.

At the time, you stated that, "There hasn't been much time that has elapsed," and you weren't aware "of any evidence of there being anticompetitive conduct."

Now that we have had more time to evaluate the market post-merger, 3 years have now passed since the merger occurred, one of your colleagues has also raised concerns that there is insufficient competition in the PDM market.

For the sake of time, could you please provide in writing a response to the following question: Can you now report on whether or not this Express Scripts-Medco merger has led to any anticompetitive effects on the PDM market? And, in addition, could you provide the Commission's overall view of the market.

Ms. RAMIREZ. I would be happy to give you a response in writing.

Mr. MARINO. Thank you so much.

Mr. Ranking Member, anything else?

Mr. JOHNSON. I am good.

Mr. MARINO. Okay. This concludes today's hearing.

I want to thank the witnesses very, very much and the people in the audience for waiting for as long as you had to.

Without objection, all Members will have 5 legislative days to submit additional written questions for the witnesses or additional materials for the record.

Again, thank you all very much. This hearing is adjourned.

[Whereupon, at 11:27 a.m., the Subcommittee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

Response to Questions for the Record from the Honorable William J. Baer, Assistant Attorney General, Antitrust Division, U.S. Department of Justice

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

August 13, 2015

The Honorable Bob Goodlatte
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

Enclosed please find responses to questions for the record arising from the appearance of Bill Baer, Assistant Attorney General, Antitrust Division, before the House Committee on the Judiciary, Subcommittee on Regulatory Reform, Commercial and Antitrust Law on May 15, 2015, at a hearing entitled "Oversight of the Antitrust Enforcement Agencies." We hope that this information is of assistance to the Committee

Please do not hesitate to contact this office if we may provide additional assistance regarding this or any other matter. The Office of Management and Budget has advised us that there is no objection to submission of this letter from the perspective of the Administration's program.

Sincerely,

Peter J. Kadzik
Assistant Attorney General

Enclosure

CC: The Honorable John Conyers, Jr.
Ranking Member

Questions submitted for the Record from Subcommittee Chairman Marino

1. **Media reports indicate that there have been allegations of antitrust violations by certain parties who participated in the recent FCC spectrum auction. How does DOJ interact with the FCC on its spectrum auctions, particularly given the FCC rules that allow for joint and coordinated bidding activity? Has the DOJ provided comment to the FCC regarding how to construct its spectrum auction rules to preclude anticompetitive activity?**

Answer:

The FCC and the Department of Justice's (the Department) Antitrust Division (the Division) have a shared interest in ensuring that consumers benefit from a competitive telecommunications marketplace. Pursuant to that shared commitment, the agencies' staffs regularly discuss issues that may be relevant to competition and consumers, both generally and with respect to specific matters, in adherence to FCC regulations regarding *ex parte* communications. The Division has participated in FCC proceedings that address the role of competition in communications, including, most recently, a June 24, 2015, letter regarding the upcoming 600 MHz spectrum auction.

With regard to the FCC's rules on joint and coordinated bidding, on July 16, 2015, the FCC adopted a Report and Order that reforms policies designed to facilitate small business ability to participate in spectrum auctions. The provisions modify the FCC's rules regarding joint bidding agreements. The Division is prepared to assist the FCC however it can.

2. **Last year, H.R. 5402, the Standard Merger and Acquisition Reviews Through Equal Rules Act of 2014, was introduced. Under this legislation, DOJ and FTC preliminary injunction standards are harmonized and the FTC is required to seek injunctions through the federal courts rather than the administrative process. Yes or no, would this legislation impair DOJ's ability to enforce the antitrust laws against proposed mergers? If so, how?**

Answer:

As stated in prior testimony, I do not think there is a practical difference in how the courts assess the factual and legal basis for enjoining a merger challenged by the Federal Trade Commission (FTC), on the one hand, or the Department on the other. The Antitrust Division and the FTC share the analytical framework set forth in the Horizontal Merger Guidelines, and we endeavor to apply them to the facts of individual cases in a manner that provides predictability, consistency, and accountability to merging parties, regardless of which agency is reviewing the transaction. The Division's approach to seeking injunctions in federal court follows longstanding legal precedent and would hope that any legislation to alter the legal standard applicable to FTC efforts to enjoin a merger would not change this precedent.

3. What is DOJ's view on the use of compulsory licensing as a remedy in antitrust cases?

Answer:

The Antitrust Division's use of licensing remedies typically arises in the context of mergers or acquisitions where they can serve as a remedy to competitive harm by facilitating entry or maintaining competitors' presence in a market. As stated in the Antitrust Division's *Guide to Merger Remedies* (2011), "In certain circumstances, parties may propose to settle under terms whereby they would license certain technology or other assets on fair and reasonable terms that would prevent harm to competition." For example, an intellectual property (IP) license to a particular purchaser of divested assets can be necessary or appropriate to maintain competition in a market, or to lower a barrier to entry after the merger, by making a license available on reasonable terms to all interested potential competitors. Recent examples of merger cases employing such provisions include *U.S. v. Bazaarvoice, Inc.*, No. 1:13-cv-00133 (N.D. Cal. 2014) (consent decree included requirements that Bazaarvoice license its ratings and reviews patents to the divestiture acquirer and allow its customers to switch to the acquirer's platform); *U.S. v. Ecolab Inc.*, No. 1:13-cv-00444 (D.D.C. 2013) (consent decree included divestiture of IP rights to the divestiture acquirer and a license back to the defendants for use in another geographic area); *U.S. and Plaintiff States v. Comcast Corp.*, No. 1:11-cv-00106 (D.D.C. 2013) (because the joint venture would have less incentive to distribute its video programming to Comcast's competitors, the consent decree included a requirement to license the joint venture's video programming to online video distributors); and *U.S. v. Google Inc.*, No. 1:11-cv-00688 (D.D.C. 2011) (consent decree required the parties to continue to license a key software product for the comparative flight search market, to license this product on fair, reasonable, and non-discriminatory terms for new licensees, and to license an add-on to the key product). In each case the Division takes care that the license is drafted effectively and monitors to ensure that the license is implemented correctly.

When IP rights are misused in ways that violate our antitrust laws, licensing requirements may also be appropriate. Although not a frequent remedy, examples do include *U.S. v. ASCAP*, No. 41-cv-1395 (S.D.N.Y. 2001) and *U.S. v. BMI*, No. 64-cv-3787 (S.D.N.Y. 1994) (consent decrees require that the associations offer licensing options in addition to a blanket license to their entire repertoires), and *U.S. v. The Mathworks, Inc.*, No. 02-888-A (E.D. Va. 2003) (consent decree included requirements to divest IP rights and other assets pertaining to products implicated in anticompetitive agreements to a competitively viable third party, but permitted the defendant to retain ownership of three patents provided it license these patents to the acquirer in ways that allow unimpeded use).

4. In your written testimony, you noted the work of DOJ in litigating and securing changes in the Anheuser-Busch InBev and Grupo Modelo transaction. Section 12 of the relevant final order required Anheuser-Busch InBev to provide DOJ with notice beyond the notices required under the Hart-Scott-Rodino Act for any additional acquisition of beer distribution assets. Has this provision been complied with? What was the purpose and rationale for including this additional notice requirement in the final order?

Answer:

Section XII of the Final Judgment was included in the decree because the Antitrust Division determined that future non-reportable acquisitions by Anheuser-Busch InBev, while too small to affect competition nationally, might have a significant competitive effect in one or more local markets. The Division has no reason to believe that Anheuser-Busch InBev has not complied with the notice of acquisitions provision of Section XII of the Final Judgment.

5. **In February, the FTC and DOJ held a second joint workshop entitled "Examining Health Care Competition." How did the FTC and DOJ solicit participants for this workshop? Were any applicants denied an opportunity to participate?**

Answer:

The FTC and the Antitrust Division actively sought substantive input from a full range of stakeholders in the health care industry. Over the course of many months, the workshop planning team, made up of staff from both the FTC and the Division, consulted with numerous stakeholders, not only to better understand the workshop topics, but also to identify potential speakers. The workshop team made it a priority to create panels that presented balanced and diverse viewpoints. We believe the panelists represented a broad range of perspectives, including hospitals and other health care providers, payers, economists, health policy experts, researchers/academics, consumer/patient advocates, government officials, and antitrust attorneys who focus on health care issues.

Following the workshop, two organizations reached out to the FTC and the Division with concerns about the make-up of the panels. We provided detailed responses explaining our efforts to ensure that all viewpoints were represented at the workshop. These letters are attached. It is important to note that the workshop was but one step in engaging stakeholders in an ongoing discussion of competition in the health care industry. In addition to the workshop, we solicited public comments on the issues covered in the workshop, kept interested parties apprised of the comment period, and included all comments and correspondence in the record of those proceedings.

6. **The public comment period for this workshop ended on April, 30. How does the FTC plan to utilize information provided by participants and received through public comments? Will a report be issued? Does the FTC or DOJ plan to incorporate the information obtained in agency guidance or new regulations?**

Answer:

The Antitrust Division is working with the FTC to review the workshop record and the public comments. We have not yet determined any next steps.

Questions submitted for the Record from Ranking Member John Conyers, Jr.

1. **You mentioned the Antitrust Division's joint efforts with the FTC to develop antitrust guidance as to cyberthreat information sharing. In April, the House passed legislation permitting the sharing of such information by companies, and the Senate is also considering similar legislation. H.R. 1731, one of the House bills, and S. 754, the Senate bill, contain antitrust exemptions. What is the Division's assessment of these exemptions? Are they necessary or problematic? Assuming that an antitrust exemption is to be included in any final legislation, are there ways that the drafting of the exemption language could be improved?**

Answer:

In April 2014, the Department and the FTC jointly issued an Antitrust Policy Statement on Sharing of Cybersecurity Information to clarify that properly designed cyber threat information sharing is not likely to raise antitrust concerns. Therefore, we do not believe there is a need for an antitrust exemption. The White House issued Statements of Administration Policy for H.R. 1560 (the "Protecting Cyber Networks Act") and H.R. 1731 (the "National Cybersecurity Protection Advancement Act") on April 21, 2015. Among the concerns the Administration expressed was that cybersecurity legislation should "ensure that information is not shared for anticompetitive purposes." The Antitrust Division stands ready to assist Congress in its legislative efforts in this regard.

2. **You cite a number of significant criminal antitrust enforcement actions in your written testimony. Has there been an increase in the number of criminal antitrust enforcement actions compared to previous years? Is greater criminal enforcement a better means of combating anticompetitive conduct?**

Answer:

In the last four fiscal years (FY 2011-2014) the Division has filed an average of 63 criminal antitrust enforcement cases, in comparison to an average of 57 cases filed in the four fiscal years prior to that (FY 2007-2010). While the number of enforcement actions in any given year may fluctuate, the intensity of our efforts is consistent and strong, and as my testimony demonstrates, so are the results of our enforcement program. There have been record criminal fines in many years over the past decade. New records for fines imposed were set in fiscal years 2009 ($1 billion), 2012 ($1.1 billion), and 2014 ($1.3 billion). The current fiscal year to date already has broken the record with the Division's announcement on May 20, 2015 that major banks agreed to plead guilty to felony charges for conspiring to manipulate prices in the foreign currency exchange spot market and agreed to pay criminal fines totaling more than $2.5 billion.

In addition, although large criminal monetary penalties make cartel behavior less attractive for corporate defendants, the threat of jail time for the company officials responsible for injuring consumers is an important and powerful deterrent. The Antitrust Division has pursued stiff penalties against individuals that are in line with other types of white collar crime and fraud.

Today more individuals involved in cartel activity are being sent to jail and are being jailed for longer periods of time than ever before. The average number of individuals sentenced to prison each year increased by 38% over the last five fiscal years as compared to the ten year period before, with prison sentences increasing by 25% over the same time periods.

Aggressively pursuing criminal price-fixers and bid-riggers benefits competition and consumers in many ways. Enforcement ensures that the specific bad conduct is eliminated. At the same time, other wrongdoers are put on notice and are dissuaded from continuing their illegal conduct. And, those contemplating price fixing realize the serious adverse consequences and may be deterred from committing the crime in the first instance. Moreover, aggressive criminal enforcement reinforces the antitrust compliance culture of the vast majority of companies who play by the rules. Ultimately, our enforcement actions result in lower prices for consumer goods and services.

3. **Would you agree that the antitrust enforcement agencies should examine carefully the relationship between increased concentration in key economic sectors that has resulted from insufficiently robust merger enforcement in the past? Would you agree that this concentration may make merger enforcement difficult by reducing the opportunity to obtain structural remedies and forcing more lawsuits to block transactions?**

Answer:

The Antitrust Division looks at the facts of each matter, including concentration in the relevant markets and concentration trends, and it acts to prevent transactions that threaten harm to competition and consumers. As explained in the antitrust agencies' Horizontal Merger Guidelines, highly concentrated markets have a greater potential to raise competitive concerns and mergers in those markets often warrant significant scrutiny. The fact that a market is concentrated does not mean a particular transaction is unlawful. It is a factor that "illuminates the merger's likely competitive effects."

In a matter where the Division believes there may be anticompetitive harm, the Division will seek a remedy that will protect and preserve competition. Your question raises a legitimate concern that negotiated dispositions may be harder to achieve in highly concentrated markets – either because any credible divestiture requirement might undermine the economics that drove the deal or because the only buyers for the assets are competitors who themselves would raise antitrust concerns. In any event, when a proposed remedy does not address the antitrust harm the Division is prepared to file a lawsuit to block the transaction.

4. **The online travel marketplace has undergone significant consolidation in recent months, with Expedia first purchasing Travelocity in January, and in February announcing its intent to purchase Orbitz. Depending on how one defines the relevant market, this consolidation could leave only one main competitor to the resulting merged entity. One concern that has been expressed is the possibility that the Expedia-Orbitz merger will lead to higher commissions charged to hotels and other providers for bookings after the**

merger and that any resulting increase in costs could ultimately be passed on to consumers as a result. Will the Division examine this issue as part of its review?

Answer:

I am limited in what I can say about Expedia's proposed acquisition of Orbitz since the Antitrust Division's review of the transaction is ongoing. I can assure you that the Division will examine the likely competitive effects on travel service suppliers, such as hotels and customers of travel products, and the Division will examine the issue you raise as part of its review.

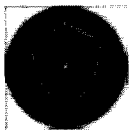
5. **What additional resources or legislative changes can Congress provide to help in the Division's enforcement efforts?**

Answer:

We appreciate this Subcommittee's support of our law enforcement efforts. The Antitrust Division is working hard to protect American consumers through vigorous enforcement of the antitrust laws. While the Division faces new challenges and is engaged in a number of activities to enhance its analytical tools and ability to identify anticompetitive conduct, the Division is currently not pursuing any legislative revisions to its tools.

The Department's FY 2016 funding bill is currently pending in Congress, and the Division believes that the funding request is necessary for it to adequately pursue its mission of protecting consumers. In that regard, I note that the President's FY 2016 budget contains a proposal to increase the Hart-Scott-Rodino Premerger Filing Fees and index them for the percentage annual change in the gross national product. The fee proposal also creates a new category and fee for mergers valued at over $1 billion. If approved by Congress, the proposal would take effect in FY 2017 and would increase revenues remitted to the antitrust agencies. This is a good value proposition for both taxpayers and consumers.

ATTACHMENTS



Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

United States Department of Justice
Antitrust Division
950 Pennsylvania Avenue, NW
Washington, DC 20530

April 1, 2015

American Hospital Association
155 North Wacker Drive
Chicago, IL 60606

Association of American Medical Colleges
655 K Street, NW, Suite 100
Washington, DC 20001-2399

Catholic Health Association of the United States
1875 Eye Street NW, Suite 1000
Washington, DC 20006

Children's Hospital Association
6803 West 64th Street
Overland Park, KS 66202

Federation of American Hospitals 750
9th Street, NW, Suite 600
Washington, DC 20001

Dear Hospital Association Representatives:

This responds to your March 16, 2015 letter concerning the joint Federal Trade Commission and U.S. Department of Justice, Antitrust Division, February 2015 workshop, *Examining Health Care Competition*.

Achieving balance and diversity of viewpoints was and remains a high priority for the workshop planning team, comprised of staff from both the FTC and the Antitrust Division. The February workshop was but one step in engaging stakeholders in an ongoing discussion of competition in the health care industry. As you know, we have solicited comments on the issues covered in the workshop and our comment period remains open until April 30. We would welcome substantive comments from your organizations and your members.

We, too, regret that several of your members chose not to participate in the February workshop. Over many months of planning, the workshop team consulted with numerous stakeholders in the health care industry, not only to better understand the workshop topics, but also to identify potential speakers. As the agenda, which was available in advance, demonstrates, panelists represented a broad range of perspectives, including hospitals and other health care providers, payers, economists, health policy experts, researchers/academics, consumer/patient advocates, government officials, and antitrust attorneys who focus on health care issues.

Hospital associations – including the American Hospital Association and Federation of American Hospitals – were among the first organizations whose perspectives and referrals we sought, and we made significant efforts to contact specific hospital stakeholders recommended by these associations, especially major hospital systems. In total, we reached out to 14 hospital systems or representative organizations. Unfortunately, many of your members and the parties you recommended declined to speak with us or to participate in the workshop.

Even though a number of your members chose not to participate, the workshop included hospital perspectives. Notable examples include the following:

- A director of the Healthcare Financial Management Association (HFMA) participated in both the provider consolidation and provider network design panels. More than half of HFMA's approximately 40,000 individual members are affiliated with hospitals. Furthermore, the advisory group for HFMA's "Value Project," one of HFMA's major initiatives relating to the workshop topics, consists of several major hospital and health provider systems. At the workshop, the HFMA representative explained many of the economic and other factors driving provider consolidation. He also discussed provider/hospital concerns regarding the use of narrow networks and limited networks, and argued that hospitals' contractual provisions prohibiting steering and tiering may be procompetitive.

- A senior executive at Sharp HealthCare – a large hospital system in San Diego, California, and an AHA health care system member – participated in the accountable care organization panel.

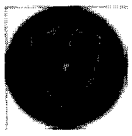
- The summation roundtable, which addressed most of the workshop topics, included private sector attorneys and a consulting economist, all of whom have worked on behalf of hospitals.

As we noted, the FTC and the Antitrust Division remain committed to receiving substantive input from the full range of stakeholders. In that spirit, we are including this exchange of correspondence in the record of those proceedings. If you or your members wish to supplement the record or to respond to statements made during the workshop, please encourage them to submit a public comment on any of the workshop topics. The comment period remains open through April 30, 2015.

Sincerely,

Marina Lao
Director, Office of Policy Planning
Federal Trade Commission

Robert Potter
Chief, Legal Policy Section
U.S. Department of Justice
Antitrust Division



Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

United States Department of Justice
Antitrust Division
950 Pennsylvania Avenue, NW
Washington, DC 20530

April 22, 2015

Michael J. Gerardi, MD, FACEP
President
American College of Emergency Physicians
2121 K Street NW, Suite 325
Washington, DC 20037

Dear Dr. Gerardi,

Thank you for your March 24, 2015 letter concerning the February 2015 Examining Health Care Competition workshop, conducted jointly by the Federal Trade Commission and the U.S. Department of Justice Antitrust Division.

Achieving balance and diversity of viewpoints was and remains a high priority for the workshop planning team, comprising staff from both the FTC and the Antitrust Division. As the workshop agenda demonstrates, panelists represented a broad range of perspectives, including providers.

The February workshop was but one step in engaging stakeholders in an ongoing discussion of competition in the health care industry. The FTC and the Antitrust Division remain committed to receiving substantive input from the full range of stakeholders. We have solicited public comments on the issues covered in the workshop, and the comment period remains open until April 30.

We appreciate the substantive points raised in your letter. If you would like us to treat your letter as a public comment, we will include your correspondence in the record of proceedings. Please contact FTC attorney Patricia Schultheiss at pschultheiss@ftc.gov to confirm. Additionally, if you, the American College of Emergency Physicians, or other ACEP members wish to supplement the record or respond to statements made during the workshop, we encourage the submission of public comments on any of the workshop topics.

Sincerely,

Marina Lao
Director, Office of Policy Planning
Federal Trade Commission

Robert Potter
Chief, Legal Policy Section
U.S. Department of Justice
Antitrust Division

Responses of Federal Trade Commission Chairwoman Edith Ramirez to Questions Submitted for the Record

Hearing on "Oversight of Antitrust Enforcement Agencies"
Subcommittee on Regulatory Reform, Commercial and Antitrust Law
Committee on the Judiciary
May 15, 2015

Questions from Subcommittee Chairman Thomas Marino

1. You stated at the Subcommittee's oversight hearing on May 15, 2015, that it is possible for staff to initiate a conduct investigation against a company without a Commission vote. Can such a staff investigation be open for over a year? Over two years? If so, please provide the number of staff investigations that have been initiated that have lasted over a year and over two years, respectively, without a Commission vote?

Virtually all investigations, including conduct investigations, involve some preliminary information gathering and analysis by staff, all carried out under the supervision of managers in the FTC's Bureau of Competition. In connection with conduct investigations, staff typically relies on publicly available information as well as information voluntarily provided by relevant market actors in order to make an assessment as to whether the conduct in question necessitates a more in-depth investigation. Based on this initial assessment, staff will either recommend that the Commission authorize a full phase investigation, including the issuance of compulsory process, or close the preliminary investigation if staff concludes that the conduct in question does not warrant further review.

Very few preliminary investigations of potentially anticompetitive conduct remain open for more than a year without a Commission vote authorizing a full-phase investigation. Among 52 conduct investigations open as of June 30, 2015, only five have been open for more than one year without a Commission vote, and only one has been open for more than two years. A preliminary investigation may remain open for more than a year for several reasons, even when there is limited activity in the matter. For instance, if staff continues to receive periodic complaints regarding the same behavior, the matter may remain open until such complaints can be properly evaluated. In other situations, an investigative file may relate to another pending investigation involving the same company or similar conduct, which may require keeping that file open.

I believe the Commission's investigative process appropriately balances our duty to investigate potential law violations without unduly burdening either the targets of our investigations or those who may have relevant information.

2. Is it possible for a company to change their behavior as a result of FTC staff's suggestion and then subsequently have staff investigation closed? Has this ever happened? If so, was changed conduct the subject of the staff investigation? If this has never happened in the history of the FTC, please affirmatively state so.

A company will sometimes alter its conduct while an FTC investigation is pending. If this happens early in an investigation, we may determine that there is no need for an enforcement action because there is little or no harm and the likelihood of that company resuming the conduct is low, among other factors. If so, the investigation is likely to be closed. This is more likely to happen in a preliminary investigation, in which case the decision to close is made by FTC staff. If an investigation has progressed to a full-phase investigation, closing the investigation requires a Commission vote. *See* 16 C.F.R. § 2.14(d) (2015).

3. Does the FTC use an economic-based test in all of its cases to examine whether activity is competitive? If not, why not?

Economic analysis plays a central role in every FTC competition matter and economists in the FTC's Bureau of Economics are involved at all stages of an investigation. From the time a file is opened, staff attorneys and economists work together to develop an investigation plan, outline possible theories of potential competitive harm, interview market participants, and analyze the information collected.

The economic analysis that is applied may include quantitative techniques to help assess whether a merger or conduct under investigation is likely to cause competitive harm and whether there are efficiencies generated by either the merger or conduct that would mitigate that harm. The type of analysis used in any given case depends on the issues under investigation and the information and data available.

Additionally, when a staff recommendation is made to the Commission, the Bureau of Economics makes its own independent recommendation, separately from the Bureau of Competition. This typically includes a detailed memorandum laying out the Bureau of Economics' analysis. In most cases, the two Bureau recommendations to the Commission are aligned.

4. In the FTC's January 3, 2013 statement closing the Google investigation, the FTC promised that "we will remain vigilant and continue to monitor Google for conduct that may harm competition and consumers." What has the FTC done since January 2013 to fulfill this promise?

In a December 27, 2012 letter to then FTC Chairman Jon Leibowitz, Google made certain commitments regarding its display of content from third-party websites and its AdWords API terms and conditions for a period of five years. Google also agreed to submit annual compliance reports describing the steps it has taken related to those commitments. To date, Google has filed three such annual reports, most recently on February 25, 2015, as well as one additional report outlining changes it made to give website owners the option to prevent crawled content from their websites from being displayed on certain Google pages. These compliance reports are similar to those filed by parties who are under Commission orders and are reviewed by staff in both the Compliance Division and the Anticompetitive Practices Division of the Bureau of Competition. In addition to the

Commission's own monitoring, parties that may have concerns about Google's conduct are likely to reach out to the FTC.

5. The FTC is in the midst of a two-year investigation of patent assertion entities, commonly referred to as "patent trolls." What is the status of the investigation? What information has been collected? Can you provide us with a preliminary report of your findings? When can we expect a final report? What actions may result after the publication of a report?

Under Section 6(b) of the FTC Act, the Commission has authority to use compulsory process to collect nonpublic information for use in industry studies that it is conducting. The Commission is using this authority to expand the collection of empirical evidence on patent assertion entity (PAE) activity and to shed light on nonpublic aspects of PAE business models, such as their organizational structure, economic relationships, and patent assertion and licensing behavior. No comparable public information is available.

The Commission's study required approval by the Office of Management and Budget (OMB). Following two public notice and comment periods, OMB approved the study in August 2014. Once the study was approved, the Commission proceeded in September 2014 to seek nonpublic information from approximately 25 PAEs and 15 other entities doing business in the wireless chipset sector. The information sought concerns the composition of PAE patent portfolios, whether any patents have been declared essential to any standards, whether PAEs share an economic interest with other entities, as well as information on assertion activity, including licensing terms and settlement data.

The Commission began receiving information from respondents in November 2014. Staff from the Office of Policy Planning, the Bureau of Competition, and the Bureau of Economics is currently analyzing the data and documents submitted. While there is no preliminary report at this time, the Commission is working towards issuing a report addressing the major questions presented in the study in approximately nine months.

6. There have been reports that China is using its antitrust laws to advance its own industrial policies at the expense of intellectual property rights, particularly the rights of American companies. How does the FTC coordinate with the other executive agencies on issues of international antitrust enforcement?

Engagement with China on antitrust enforcement continues to be a high priority for the FTC. First, the FTC engages directly with the three Chinese antimonopoly law (AML) enforcement agencies on specific matters under concurrent review. Second, we work closely with the Department of Justice Antitrust Division (DOJ) on competition policy issues involving China. Pursuant to our Memorandum of Understanding with the Chinese AML agencies, FTC senior officials and those from DOJ conduct an annual high-level dialogue with the Chinese vice ministers that oversee AML enforcement by China's antitrust enforcement agencies. We use this forum to address key issues, including issues relating to the application of antitrust laws to intellectual property rights. Finally, we coordinate with other executive branch agencies on policy issues of U.S. government

concern through the interagency process. For example, the FTC contributes to the development and negotiation of outcomes relating to China's AML enforcement in the Strategic and Economic Dialogue as well as the Joint Commission on Commerce and Trade.

7. To the extent a foreign country is applying antitrust laws in a protectionist manner, how does your agency and each of the other agencies respond to address the issue?

The FTC has long advocated internationally that competition law is most effective when used to maximize consumer welfare and applied in a non-discriminatory manner. We advocate for these principles through public speeches,[1] in multilateral bodies such as the International Competition Network, and directly with our foreign agency counterparts. Using competition law for protectionist purposes undermines the consumer benefits from competition law enforcement as well as the legitimacy of the competition law system globally.

Although it can be difficult to determine whether particular enforcement actions are, in fact, motivated by protectionist concerns as opposed to legitimate competition policies, we seek to assess patterns of discriminatory enforcement. If it appears that enforcement may be based on protectionism, the FTC may raise, where appropriate, the issue directly with the relevant agency and/or coordinate with other U.S. agencies through the interagency process to address the issue.

8. To the extent a foreign country is not allowing for due process in antitrust cases, how does your agency and each of the other agencies respond to address the issue?

The FTC has long been a strong advocate for the importance of due process in antitrust investigations internationally. Through both our bilateral relationships and in the relevant multilateral bodies in which we participate, the FTC consistently emphasizes that providing due process is essential. Transparency, meaningful engagement with parties, the right to counsel, and the protection of confidential information ensures fairness to parties, results in fully informed enforcement decisions, and enhances the credibility of antitrust enforcement overall.

An example of the FTC's global leadership in this area is a project the FTC initiated and co-led in the International Competition Network (ICN) that recently culminated in consensus Guidance on Investigative Process that lays out good practice standards for procedural fairness in antitrust investigations. ICN instruments serve as international best practice benchmarks that promote convergence by the ICN's over 130 competition

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[1] *See, e.g.*, Edith Ramirez, Chairwoman, Fed. Trade Comm'n, Keynote Address, Seventh Annual Global Antitrust Enforcement Symposium (Sept. 25, 2013), *available at* https://www.ftc.gov/sites/default/files/documents/public_statements/7th-annual-global-antitrust-enforcement-symposium/130925georgetownantitrustspeech.pdf ; Edith Ramirez, Chairwoman, Fed. Trade Comm'n, Core Competition Agency Principles: Lessons Learned from the FTC, Keynote Address at the Antitrust in Asia Conference, Beijing, China (May 22, 2014), *available at* https://www.ftc.gov/system/files/documents/public_statements/314151/140522abachinakeynote.pdf.

agency members. The FTC also incorporates due process principles into our technical assistance to antitrust agencies around the world, including our staff comments on draft laws and regulations, which enables the FTC to address potential due process issues before they become problems.

When the FTC learns that an antitrust enforcement agency may not be providing adequate due process, in appropriate cases we use our strong bilateral relationships to raise these concerns. In our experience, antitrust agencies can be highly responsive when we engage with them about these concerns. Additionally, depending on the circumstances, FTC staff and officials also work with U.S. embassies and other U.S. government agencies through the interagency process to determine the most effective strategy to address due process concerns.

9. What is your action plan this year and next to address the potential industrial policy components of China's antitrust enforcement?

As noted above, the FTC has consistently advocated that competition enforcement around the globe should aim to promote consumer welfare rather than industrial policy or other objectives. As also detailed above, we will continue to advocate these principles through our ongoing engagement with the Chinese competition enforcement agencies, as well as through training programs and comments to proposed regulations and guidelines promulgated under the AML.

10. Enropean antitrnst enforcement agencies and courts have applied European antitrust law in a manner that creates additional responsibilities for companies that reach "dominant" status. What have your agency and other agencies done to advocate for parity in the enforcement of U.S. and European antitrust laws that is consistent with U.S. law?

With over 130 competition laws around the world, the FTC works to promote convergence toward sound and consistent enforcement, including through its strong relationship with the European Commission (EC). While the U.S. and EU competition agencies have achieved substantial convergence in many areas, some differences remain, particularly in the area of single firm conduct. These differences are attributable to differences in the applicable law in the two jurisdictions ("monopolization" in the United States versus "abuse of a dominant position" in the European Union). While the relevant legal standards are distinct, the EC Competition Directorate has taken significant steps to implement an effects-based approach to enforcing its rules involving dominant firms similar to that employed by the FTC and DOJ.

The Commission regularly engages with the EC's Competition Directorate on issues involving dominant firms. This engagement takes several forms, including: (1) cooperation on individual cases where we exchange views on legal theories, evidence, analyses, and remedies; (2) participation in working groups to address policies and practices; and (3) participation in multilateral bodies such as the OECD Competition Committee and the International Competition Network where we advocate good practice standards based on consumer welfare and economic efficiency. This engagement allows

us to better understand similarities and differences between our systems, explain the U.S. approach, and work to minimize differences in analyses and outcomes to the extent possible under our respective legal systems.

11. What is your agency's view on the use of compulsory licensing as a remedy in antitrust cases?

In certain circumstances, requiring a company to license its technology or know-how may be appropriate to alleviate concerns that an acquisition or course of conduct is likely to harm competition. For instance, in several merger orders, the Commission has required that intellectual property rights be divested through a license in order to resolve Commission claims that a proposed acquisition was likely to substantially reduce competition in violation of Section 7 of the Clayton Act. Sometimes the relevant intellectual property may be divested outright and the rights then transferred to a Commission-approved buyer. In other instances, the Commission requires the merged firm to grant a license to the buyer while retaining ownership of the intellectual property. As an example, the Commission required Honeywell International to license patents critical to the manufacture of two-dimensional bar code scanners to preserve the competition that would otherwise be lost due to its merger with rival Intermec, Inc.[2] Compulsory licensing of intellectual property is also a common feature in remedies for pharmaceutical mergers. Although the Commission prefers a traditional divestiture of assets as a merger remedy, licensing requirements can be effective in preserving competition in markets where access to needed technology is a main barrier to entry.

In more limited circumstances, the Commission may order a modification of existing licenses in order to remedy the harmful effects of anticompetitive conduct involving the misuse of intellectual property rights. As an example, Intel Corp. agreed to extend an existing licensing agreement for an additional five years and maintain an open interface on its CPU platforms for six years when it settled FTC charges that it had used anticompetitive tactics to cut off rivals' access to the marketplace and stymie innovation in microchips.[3] Intel also agreed to certain changes in its contracts and practices in order to undo the effects of its anticompetitive conduct and prevent its recurrence, restoring as much as possible the competitive conditions that would have prevailed absent Intel's anticompetitive behavior.

A remedy involving a change in ownership or a license of intellectual property rights must be limited to situations in which there is an underlying antitrust violation and the relief obtained is necessary to remedy actual or likely anticompetitive harm. As I have

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[2] *In the Matter of Honeywell Int'l Inc.*, Dkt. No. C-4418 (complaint issued Sept. 13, 2013). *See also In the Matter of Graco Inc.*, Dkt. No. C-9350 (modified final order issued Oct. 6, 2014); *In the Matter of Nielsen Holdings N.V.*, Dkt. No. C-4439 (final order issued Feb. 28, 2014).

[3] *In the Matter of Intel Corp.*, Dkt. No. C-9341 (final order issued Nov. 2, 2010).

emphasized in a number of public remarks, sound competition enforcement requires a focus on competition factors alone, not on other economic or policy objectives.[4]

12. I understand that the FTC plans to review the "Eyeglass Rule" (16 C.P.R. §§ 456.1-456.5) and the "Contact Lens Rule" (16 C.P.R.§§ 315.1-315.11). When will the FTC officially reopen the rules and what will be the scope of the review?

As part of its ongoing systematic review of all FTC rules and guides, the Commission expects to publish notices in the Federal Register later this fall that will request public comments on both the Ophthalmic Practice Rules (Eyeglass Rule) and the Contact Lens Rule. Both of these notices will request comments on, among other things, the economic impact and benefits of the rules, possible conflicts between the rules and state, local, or other Federal laws or regulations, and the effect on the rules of any technological, economic, or other industry changes.

13. Eye wear providers may not provide eyeglasses to consumers without a valid prescription, and providers will verify prescriptions before they fill them. The Contact Lens Rule requires prescribers to verify within 8 hours the accuracy of prescriptions when asked by a provider to do so. However, the Eyeglass Rule does not have any similar requirements. Prescribers are not required to verify prescriptions at all. Will the disparity between these two rules be one of the elements you consider as part of the review? Are there other disparities between the two rules that the FTC will consider as part of its review?

The Eyeglass Rule, first promulgated by the Commission in 1978, requires an optometrist or ophthalmologist to provide eyeglass prescriptions to patients, at no extra cost, immediately following completion of an eye examination. Congress enacted The Fairness to Contact Lens Consumers Act, 15 U.S.C. §§ 7601-7610, in 2003, and pursuant to the Act, the Commission promulgated the Contact Lens Rule. The Contact Lens Rule requires that eye care prescribers provide a copy of a consumer's prescription to the consumer upon completion of a contact lens fitting and verify or provide prescriptions to authorized third parties. The Rule also mandates that a contact lens seller may sell contact lenses only in accordance with a prescription that the seller either: (a) has received from the patient or prescriber; or (b) has verified through direct communication with the prescriber. FTC staff expects to receive comments on the disparities between the rules and will review all comments and evidence submitted in light of the applicable legal standards to determine if Commission action to modify either rule is warranted.

14. In the FTC's policy document entitled "Negotiating Merger Remedies" it states that if "the staff determines that anticompetitive effects are likely,..."the staff"...will discuss with the parties ... what it believes an acceptable remedy must include to maintain or restore competition in the markets affected by the merger." Is this still the policy of the FTC? If so, are you aware of instances where the FTC has not adhered to this policy? If there are

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[4] *See* Edith Ramirez, Chairwoman, Fed. Trade Comm'n, Core Competition Agency Principles: Lessons Learned from the FTC, Keynote Address at the Antitrust in Asia Conference, Beijing, China (May 22, 2014), *available at* https://www.ftc.gov/system/files/documents/public_statements/314151/140522abachinakeynote.pdf.

instances where the FTC did not follow this policy, can you please explain why in each instance the policy was not adhered to.

It is the policy of the Bureau of Competition to discuss with merging parties how staff views the competitive issues raised by a merger, and, where there are concerns, to discuss what remedy staff believes will be needed to restore or maintain competition. In fact, the majority of Commission merger enforcement actions are resolved through a negotiated resolution. Negotiated settlements can often be as effective in maintaining or restoring competition as litigated outcomes, preserving existing levels of competition or restoring the competition lost after a consummated merger.

Indeed, where a consent order can address the harm the Commission alleges has occurred or is likely to occur without the need for litigation, there are benefits to resolving matters through a settlement. In addition to obtaining a quick resolution and avoiding litigation costs for both sides, a consent order allows us to be tailored in our approach – to eliminate the anticompetitive aspects of a transaction while allowing the procompetitive or competitively benign aspects of the merger to proceed.

But not every discussion of possible remedies results in a negotiated settlement, and the Commission will reject a settlement proposal from the parties and challenge the transaction if it does not believe the proposal will address the competitive harm that is likely to result from the proposed merger.

15. In recent years, the FTC has examined and challenged a number of mergers and acquisitions involving hospital systems and healthcare providers. One of the arguments raised by healthcare providers in response to these actions is that greater integration is necessary to provide a higher level of coordinated care for the communities they serve. What guidance, formal or informal, has the FTC provided for prospective mergers of healthcare or hospital systems? What factors does the FTC use to examine proposed mergers, and determine whether a challenge is necessary?

The integration of care provided to patients is fully compatible with core antitrust principles. Even before issuance of the joint *Health Care Statements* in 1996,[5] but especially since, the FTC and DOJ have consistently made clear that there is no tension between rigorous antitrust enforcement and bona fide efforts to coordinate care, so long as those efforts do not result in the accumulation or abuse of market power. The passage of the Affordable Care Act (ACA) has not altered the antitrust standards applicable to collaborations designed to reduce costs and improve the quality of health care.[6] Nor does

[5] U.S. Dep't. of Justice & Fed. Trade Comm'n, Statements of Enforcement Policy in Health Care (1996), *available at* http://www.ftc.gov/sites/default/files/attachments/competition-policy-guidance/statements_of_antitrust_enforcement_policy_in_health_care_august_1996.pdf.

[6] *See* Medicare Program, Medicare Shared Savings Program: Accountable Care Organizations, Final Rule, 76 Fed. Reg., 67,802, 67,841 (Nov. 2, 2011) (to be codified at 42 C.F.R. pt. 425) ("[C]ompetition in the marketplace benefits Medicare and the Shared Savings Program because it promotes quality of care for Medicare beneficiaries and protects beneficiary access to care . . . . Competition among ACOs can accelerate advancements in quality and efficiency. All of these benefits to Medicare patients would be reduced or eliminated if we were to allow ACOs to

the ACA require providers to merge or consolidate in order to achieve its policy objectives. For example, the ACA identifies a number of ways that accountable care organizations (ACOs) may be formed, including through contractual arrangements falling short of a merger. Such arrangements may raise fewer competitive concerns.

Collaboration, achieved through a merger or by other means, designed to promote integrated health care can benefit consumers. On the other hand, collaboration that eliminates or reduces price competition or allows providers to gain increased bargaining leverage with health plans raises significant antitrust concerns, particularly if integration involves a substantial portion of the competing providers of any particular service or specialty in a relevant geographic market. Research shows that healthcare providers with significant market power may be able to negotiate higher than competitive payment rates, often without offsetting improvements in quality.[7]

In an effort to provide antitrust guidance to healthcare providers, the Commission has detailed its views on the interplay between antitrust and health care in a wide array of contexts. Some examples include: statements of enforcement policy such as the *Statement of Antitrust Enforcement Policy Regarding Accountable Care Organizations Participating in the Medicare Shared Savings Program* (ACO Policy Statement);[8] a seminal hearing and report;[9] extensive advisory opinions on a wide variety of topics;[10] congressional testimony; speeches; amicus briefs detailing the application of antitrust law to healthcare conduct; press releases; blog posts; and advocacy in the area of state and local regulation.[11] As recently as February 2015, the FTC, along with DOJ, convened a

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participate in the Shared Savings Program when their formation and participation would create market power."), *available at* http://www.gpo.gov/fdsys/pkg/FR-2011-11-02/pdf/2011-27461.pdf.

[7] *See, e.g.*, Martin Gaynor & Robert Town, *The Impact of Hospital Consolidation – Update*, Robert Wood Johnson Found., The Synthesis Project (June 2012), *available at* http://www.rwjf.org/en/research-publications/find-rwjf-research/2012/06/the-impact-of-hospital-consolidation.html.

[8] Fed. Trade Comm'n & Dep't of Justice, Statement of Antitrust Enforcement Policy Regarding Accountable Care Organizations Participating in the Medicare Shared Savings Program, 76 Fed. Reg. 67026 (Oct. 28, 2011).

[9] Fed. Trade Comm'n and Dep't of Justice, Improving Health Care: A Dose of Competition (2004), *available at* http://www.ftc.gov/reports/healthcare/040723healthcarerpt.pdf.

[10] *See, e.g.*, Letter from Markus H. Meier, Assistant Director, Bureau of Competition, Fed. Trade Comm'n to Michael E. Joseph, McAfee & Taft (Feb. 13, 2013), *available at* http://www.ftc.gov/sites/default/files/documents/advisory-opinions/norman-physician-hospital-organization/130213normanphoadvltr_0.pdf; Letter from Markus H. Meier, Assistant Director, Bureau of Competition, Fed. Trade Comm'n to Christi J. Braun, Ober, Kaler, Grimes & Shriver 8 (April 13, 2009), *available at* https://www.ftc.gov/sites/default/files/documents/advisory-opinions/tristate-health-partners-inc./090413tristateaoletter.pdf ; Letter from Markus H. Meier, Assistant Director, Bureau of Competition, Fed. Trade Comm'n to Christi J. Braun & John J. Miles, Ober, Kaler, Grimes & Shriver 7 (Sept. 17, 2007), *available at* http://www.ftc.gov/sites/default/files/documents/public_statements/ftc-staff-will-not-recommend-antitrust-challenge-proposal-provide-member-physicians-services-through/070921finalgripamcd.pdf.

[11] Materials related to the Commission's competition healthcare work are compiled online at http://www.ftc.gov/tips-advice/competition-guidance/industry-guidance/health-care.

two-day public workshop to discuss cutting-edge issues in health care such as telemedicine, advancements in healthcare technology, measuring and assessing healthcare quality, and price transparency of healthcare services.[12]

As laid out in this guidance and elsewhere, we review a variety of evidence to evaluate the competitive impact of a transaction involving hospitals or other healthcare providers. In particular, we assess whether the transaction is likely to result in market power that would lead to higher costs and reduced quality of care. We also carefully consider evidence that the transaction will benefit consumers through improved quality, new services, and/or decreased costs. We expect and encourage parties to provide us with concrete evidence to support their quality claims. The Commission only challenges transactions if it has reason to believe that the merger in question is likely to lead to higher prices and/or reduced quality by eliminating significant competition.[13]

16. What steps or procedures has the FTC implemented for review of consummated mergers or acquisitions within the healthcare industry to ensure that the relevant markets remain competitive and prices have not increased as a result of the related transaction?

The agency has an active program to identify all mergers – both proposed and consummated – that are likely to substantially lessen competition and harm consumers. Although the antitrust agencies rely primarily on premerger notification filings under the Hart-Scott-Rodino (HSR) Act to identify anticompetitive mergers, not all transactions require HSR premerger notification, and many healthcare provider acquisitions, including those involving physician practice groups or single hospitals, fall below the reporting thresholds and are not reportable. Consequently, several of our recent successful healthcare provider challenges have involved consummated healthcare mergers.[14]

Consummated mergers come to our attention in a number of ways. Many investigations of consummated mergers begin with complaints from customers about price increases they believe are attributable to a recent merger. Commission staff examines such complaints carefully, even when the transaction at issue is relatively small, because significant competitive harm can result from even small transactions. In addition, staff attends industry events and monitors the trade press to stay informed about announced deals that may not result in HSR filings and to monitor concerns expressed by market participants about competitive conditions.

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[12] Examining Health Care Competition Workshop materials are available at http://www.ftc.gov/news-events/events-calendar/2014/03/examining-health-care-competition.

[13] *See, e.g., St. Alphonsus Med. Center-Nampa Inc. v. St. Luke's Health Sys., Ltd.*, 778 F.3d 775 (9th Cir. 2015); *ProMedica Health Sys., Inc. v. FTC*, 749 F.3d 559 (6th Cir. 2014); *FTC v. OSF Healthcare Sys.*, 852 F. Supp. 2d 1069, 1095 (N.D. Ill. 2012).

[14] *See, e.g., St. Alphonsus*, 778 F.3d at 781-82; *ProMedica Health Sys.*, 749 F.3d at 561; *In the Matter of Renown Health*, Dkt. No. C-4366 (Dec. 4, 2012), *available at* https://www.ftc.gov/enforcement/cases-proceedings/1110101/renown-health-matter; *In the Matter of Evanston Northwestern Healthcare Corp.*, Dkt. No. 9315 (Aug. 6, 2007), *available at* http://www.ftc.gov/os/adjpro/d9315/070806opinion.pdf.

17. In February, the FTC and DOJ held a second joint workshop entitled "Examining Health Care Competition." How did the FTC and DOJ solicit participants for this workshop? Were any applicants denied an opportunity to participate?

Over many months of preparation, the workshop planning team, comprised of staff from both the FTC and DOJ, consulted with more than 80 stakeholders and experts in the healthcare sector, both to develop the workshop agenda and to identify potential speakers. Achieving balance and diversity of viewpoints was a priority for the team. As a result, the lineup of panelists participating in the workshop represented a broad range of perspectives, including hospitals and other healthcare providers, payers, economists, health policy experts, researchers/academics, consumer/patient advocates, government officials, and antitrust practitioners who focus on healthcare issues.

In addition to the workshop itself, we encouraged all interested stakeholders to submit public comments, which became part of the official public record along with the workshop transcript.

We did receive two post-workshop letters from hospital and provider groups, claiming they were not adequately represented at the workshop. I disagree with their assertions and attach two letters responding to their concerns.

18. The public comment period for this workshop ended on April 30. How does the FTC plan to utilize information provided by participants and received through public comments? Will a report be issued? Does the FTC or DOJ plan to incorporate the information obtained in agency guidance or new regulations?

The primary purpose of the workshop was for the FTC and DOJ to learn more about new and evolving trends in healthcare markets. Staying abreast of developments in sectors like this one that is in the midst of significant change is very important. Information from the workshop and the public comments will inform FTC policy initiatives, research efforts, and law enforcement work. Additionally, the FTC and DOJ will continue to explore ways in which the antitrust agencies might collaborate on future healthcare policy initiatives, such as future workshops, position papers, and/or advocacy comments to state legislative and regulatory bodies.

We continue to review the information received both from the workshop itself as well as the submitted comments. Once that process is complete, we will determine whether it would be useful to issue a report or other work product addressing the topics covered in the workshop.

Questions from Committee Ranking Member John Conyers, Jr.

1. Assistant Attorney General Baer mentioned the Antitrust Division's joint efforts with the FTC to develop antitrust guidance as to cyberthreat information sharing. In April, the House passed legislation permitting the sharing of such information by companies and the Senate is considering similar legislation. H.R. 1731, one of the House bills, and S. 754, the Senate bill, contain antitrust exemptions. What is the FTC's assessment of these exemptions? Are they necessary or problematic? Assuming that an antitrust exemption is to be included in any final legislation, are there ways that the drafting of the exemption language could be improved?

The FTC recognizes that sharing cybersecurity information can help secure our nation's networks. As Assistant Attorney General Baer noted in his testimony, in April 2014, DOJ and the FTC jointly issued an Antitrust Policy Statement on Sharing of Cybersecurity Information to clarify that properly designed cyber threat information sharing is unlikely to raise antitrust concerns.

The FTC generally does not support antitrust exemptions. I do not believe that an exemption is necessary in this area because the legitimate sharing of cybersecurity threat information is unlikely to violate the antitrust laws. To the extent an exemption is included in the proposed legislation, we are available to provide assistance to Congress to mitigate the potential for an adverse impact on competition. As I noted, however, I do not believe an exemption is needed.

2. Some have expressed concerns that purported efforts by contact lens manufacturers to stop retail discounting amount to unlawful vertical price fixing. At least one private lawsuit has been filed regarding this matter. What efforts has the FTC undertaken regarding this issue?

While I cannot address the existence or details of any non-public investigations, the Commission is aware of concerns raised about the conduct of certain contact lens manufacturers in relation to their vertical pricing policies, including those discussed at a hearing before the Senate Antitrust, Competition Policy and Consumer Rights Subcommittee last summer. Determining whether any particular conduct is anticompetitive is a fact-specific inquiry requiring a careful examination. To date, the Commission has not brought a case against a contact lens manufacturer alleging a violation of the antitrust laws related to vertical pricing practices.

3. Would you agree that the antitrust enforcement agencies should examine carefully the relationship between increased concentration in key economic sectors that has resulted from insufficiently robust merger enforcement in the past? Would you agree that this concentration may make merger enforcement difficult by reducing the opportunity to obtain structural remedies and forcing more lawsuits to block transactions?

Concentrated markets require a commitment to vigilant and vigorous antitrust enforcement. I believe the Commission's track record under my leadership shows exactly

that. Although we resolve a majority of our merger challenges through settlements involving structural relief designed to address the identified competitive harm, when a proposed remedy is insufficient to address the FTC's competitive concerns, we have not hesitated to litigate to stop the transaction.

For example, we recently successfully challenged Sysco Corporation's proposed acquisition of its main rival, US Foods, even after the parties came forward with a proposed remedy. Even with the proffered divestitures, the Commission had reason to believe that the merger was likely to significantly reduce competition in the market for broadline foodservice distribution, both nationwide and in a large number of local markets. In June, the Commission obtained a preliminary injunction temporarily blocking the proposed transaction.[15] The parties abandoned the transaction following the federal district court's ruling.[16]

4. What additional resources or legislative changes can Congress provide to help in the FTC's enforcement efforts?

I support the repeal of current exemptions in the Federal Trade Commission Act for non-profit entities and common carriers, as well as the repeal of the McCarran-Ferguson Act as to healthcare insurers. I believe that lifting these restrictions on the FTC's jurisdiction would be beneficial for competition and consumers. As I have previously expressed, I also support legislation declaring that pay-for-delay arrangements are presumptively illegal.

With respect to budgetary resources, I note that the President's budget for FY2016 proposes an increase in Hart-Scott-Rodino Act (HSR) fees to adjust them for inflation and create a new fee tier for large transactions. Although increasing HSR fees will not necessarily increase the antitrust agencies' appropriation, I support the proposal to increase these fees, which have not changed in over a decade.

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[15] *FTC v. Sysco Corp.*, Civil No. 1:15-cv-00256 (APM), 2015 WL 3958568, at *61 (D.D.C. June 23, 2015).

[16] Press Release, Fed. Trade Comm'n, Following Sysco's Abandonment of Proposed Merger with US Foods, FTC Closes Case (July 1, 2015), *available at* https://www.ftc.gov/news-events/press-releases/2015/07/following-syscos-abandonment-proposed-merger-us-foods-ftc-closes.

ATTACHMENTS

American College of Emergency Physicians
ADVANCING EMERGENCY CARE

March 24, 2015

The Honorable Edith Ramirez
Chairwoman
Federal Trade Commission
600 Pennsylvania, Avenue N.W., Room 438 Washington, D.C., 20580

The Honorable William Baer
Assistant Attorney General
United States Department of Justice
Antitrust Division 950 Pennsylvania Avenue, N.W. Washington, D.C., 20530

Dear Chairwoman Ramirez and Assistant Attorney General Baer:

On behalf of our 33,000 physician members of the American College of Emergency Physicians (ACEP), I am writing to express my concern about your recent workshop--Examining Healthcare Competition. The composition of most panels was heavily weighted to economists and health insurers, with very few medical providers. In addition, the lack of input from emergency medicine, a key stakeholder in the nation's health care system, contributed to unbalanced and inaccurate perspectives on the current practice environment.

For example, suggestions to assign physicians and hospitals into "quality and value" tiers may sound reasonable, but as a recent study of hospital ratings shows, each rating organization uses different criteria which greatly reduces the value of these data to consumers. In addition, some emergency physicians are reporting that the tiering efforts in their states are placing them in every tier depending on the criteria used, which underscores how complicated and unreliable these criteria can be.

Several panelists also called for an end to cost shifting in health care services. This is not realistic in the current environment, unless the federal government and the states were to address how public programs have historically underpaid their share of costs and ignored the costs of the under and uninsured.

Emergency physicians are unique as they practice under The Emergency Medical Treatment and Labor Act (EMTALA) of 1986. This (unfunded) federal law mandates that hospitals (and therefore emergency physicians) see every individual who comes to the emergency department, regardless of ability to pay. This law, which ACEP supports, has allowed some health insurers to take advantage of physicians and pay them at extremely low rates. As a result, physicians are dropping out of networks, and that is causing problems for unsuspecting patients, especially those experiencing emergencies.

Without the ability to balance bill, insurers would accelerate their efforts to reduce physician fees even further. Our members would prefer to participate in networks, and ACEP has urged CMS for over three years to require insurers to use a transparent, verifiable database to establish fair payment rates that cover the costs of care. Facts like these were ignored, while panelists focused on concerns of growth of provider market power and the unfairness of balanced billing, while praising insurers for their competitive behavior.

ACEP's members are anxious to participate in alternative payment models, but to date, emergency care has not been included in bundles, episodes, etc. and, despite the fact that over 50 percent of inpatient admissions come through the emergency department, ACOs have not integrated emergency physicians into shared savings to date. Perhaps a

statewide hospital global payment model like that underway in Maryland will provide a large-scale test case to see if global payment is a promising policy lever that can result in a level of integration and cooperation that will improve patient outcomes and reduce costs.

If you would like to discuss these comments with me, please contact Barbara Tomar in our Washington, DC, office at 202-728-0610, ext. 3017 or btomar@acep.org. ACEP stands ready to work with your staffs to implement health care reform and to ensure that enforcement is based on accurate marketplace information. We trust that our comments and perspective will be given consideration by the FTC and Antitrust Division.

Sincerely,

Michael J. Gerardi, MD, FACEP
President, ACEP

Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

United States Department of Justice
Antitrust Division
950 Pennsylvania Avenue, NW
Washington, DC 20530

April 22, 2015

Michael J. Gerardi, MD, FACEP
American College of Emergency Physicians
2121 K Street NW, Suite 325
Washington, DC 20037

Dear Dr. Gerardi,

Thank you for your March 24, 2015 letter concerning the February 2015 Examining Health Care Competition workshop, conducted jointly by the Federal Trade Commission and the U.S. Department of Justice Antitrust Division.

Achieving balance and diversity of viewpoints was and remains a high priority for the workshop planning team, comprising staff from both the FTC and the Antitrust Division. As the workshop agenda demonstrates, panelists represented a broad range of perspectives, including providers.

The February workshop was but one step in engaging stakeholders in an ongoing discussion of competition in the health care industry. The FTC and the Antitrust Division remain committed to receiving substantive input from the full range of stakeholders. We have solicited public comments on the issues covered in the workshop, and the comment period remains open until April 30.

We appreciate the substantive points raised in your letter. If you would like us to treat your letter as a public comment, we will include your correspondence in the record of proceedings. Please contact FTC attorney Patricia Schultheiss at pschultheiss@ftc.gov to confirm. Additionally, if you, the American College of Emergency Physicians, or other ACEP members wish to supplement the record or respond to statements made during the workshop, we encourage the submission of public comments on any of the workshop topics.

Sincerely,

Marina Lao

Marina Lao
Director, Office of Policy Planning
Federal Trade Commission

Robert Potter

Robert Potter
Chief, Legal Policy Section
U.S. Department of Justice
Antitrust Division

March 16, 2015

The Honorable Edith Ramirez, Chairwoman
Federal Trade Commission
600 Pennsylvania, Avenue N.W., Room 438
Washington, D.C., 20580

The Honorable William Baer
Assistant Attorney General
United States Department of Justice
Antitrust Division
950 Pennsylvania Avenue, N.W.
Washington, D.C., 20530

Dear Chairwoman Ramirez and Assistant Attorney General Baer:

We are writing to convey our profound disappointment with the recent workshop entitled *Examining Health Care Competition*. As representatives of our nation's hospitals, we were frankly surprised at the lack of hospital participation/representation over the two days, especially as the day began with FTC staff saying that "our credibility depends heavily on our industry knowledge."

The Workshop's apparent lack of objectivity and balance deprived policymakers of the opportunity to better understand the strides the hospital field is making in transforming the delivery of healthcare in response to many market factors and how various types of transactions are essential to achieve that goal. As a result, we believe that the workshop did a disservice to its stated fact-finding mission, to the entire hospital field, and to the patients whose care benefits from the changes and innovations that are occurring.

We understand that many speakers at the workshop evidenced hostility to hospitals. Even in the framing presentation, for example, the speaker characterized hospitals as being motivated simply by "leverage" against health insurers and increases in Medicare payments, while overlooking quality and other key reasons for hospital collaboration and consolidation. We further

understand that the simplistic depiction of hospitals seeking leverage over payers continued throughout the sessions. Based on reports about the workshop, we understand that the vast majority of speakers showed little to no recognition of any of the benefits of health care consolidation, and simply focused on feared increases in price or leverage. There was hardly any mention of even indisputable benefits, such as rescuing failing hospitals and improving the quality of services at hospitals with a low census or lack of capital to fund improvements to equipment.

The overwhelming anti-hospital points of view were perhaps not surprising, since it is our understanding that most of the speakers were either representatives of health plans or well-known critics of hospitals. The single speaker representing a hospital system was on the panel addressing Accountable Care Organizations. There was no representative of a hospital speaking about the benefits of provider consolidation. And of the many economists who testified, we could identify only one has worked closely with hospital clients, even though there are many well-qualified health care antitrust economists who would have been able to contribute more balanced views.

We strongly urge that future health care forums allow for more balanced and comprehensive views about the transforming hospital field to be heard by seeking input from experienced hospital executives and their representatives.

To this end, the undersigned hospital associations stand ready to provide any assistance necessary to help provide appropriate panelists and subject matter to ensure the antitrust enforcement agencies obtain robust and complete marketplace information that ensures a balanced public record and a sound basis for public policy decisions. The undersigned associations reserve the opportunity to submit additional comments to ensure that the full record of this workshop contains a broad range of views. We trust that all of this information will be given consideration by the FTC and Antitrust Division.

Sincerely,

American Hospital Association
Association of American Medical Colleges
Catholic Health Association of the United States
Children's Hospital Association
Federation of American Hospitals

Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

United States Department of Justice
Antitrust Division
950 Pennsylvania Avenue, NW
Washington, DC 20530

April 1, 2015

American Hospital Association
155 North Wacker Drive
Chicago, IL 60606

Association of American Medical Colleges
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Washington, DC 20001-2399

Catholic Health Association of the United States
1875 Eye Street NW, Suite 1000
Washington, DC 20006

Children's Hospital Association
6803 West 64th Street
Overland Park, KS 66202

Federation of American Hospitals
750 9th Street, NW, Suite 600
Washington, DC 20001

Dear Hospital Association Representatives:

This responds to your March 16, 2015 letter concerning the joint Federal Trade Commission and U.S. Department of Justice, Antitrust Division, February 2015 workshop, *Examining Health Care Competition*.

Achieving balance and diversity of viewpoints was and remains a high priority for the workshop planning team, comprised of staff from both the FTC and the Antitrust Division. The February workshop was but one step in engaging stakeholders in an ongoing discussion of competition in the health care industry. As you know, we have solicited comments on the issues covered in the workshop and our comment period remains open until April 30. We would welcome substantive comments from your organizations and your members.

We, too, regret that several of your members chose not to participate in the February workshop. Over many months of planning, the workshop team consulted with numerous stakeholders in the health care industry, not only to better understand the workshop topics, but also to identify potential speakers. As the agenda, which was available in advance, demonstrates, panelists represented a broad range of perspectives, including hospitals and other health care providers, payers, economists, health policy experts, researchers/academics, consumer/patient advocates, government officials, and antitrust attorneys who focus on health care issues.

Hospital associations – including the American Hospital Association and Federation of American Hospitals – were among the first organizations whose perspectives and referrals we sought, and we made significant efforts to contact specific hospital stakeholders recommended by these associations, especially major hospital systems. In total, we reached out to 14 hospital systems or representative organizations. Unfortunately, many of your members and the parties you recommended declined to speak with us or to participate in the workshop.

Even though a number of your members chose not to participate, the workshop included hospital perspectives. Notable examples include the following:

- A director of the Healthcare Financial Management Association (HFMA) participated in both the provider consolidation and provider network design panels. More than half of HFMA's approximately 40,000 individual members are affiliated with hospitals. Furthermore, the advisory group for HFMA's "Value Project," one of HFMA's major initiatives relating to the workshop topics, consists of several major hospital and health provider systems. At the workshop, the HFMA representative explained many of the economic and other factors driving provider consolidation. He also discussed provider/hospital concerns regarding the use of narrow networks and limited networks, and argued that hospitals' contractual provisions prohibiting steering and tiering may be procompetitive.

- A senior executive at Sharp HealthCare – a large hospital system in San Diego, California, and an AHA health care system member – participated in the accountable care organization panel.

- The summation roundtable, which addressed most of the workshop topics, included private sector attorneys and a consulting economist, all of whom have worked on behalf of hospitals.

As we noted, the FTC and the Antitrust Division remain committed to receiving substantive input from the full range of stakeholders. In that spirit, we are including this exchange of correspondence in the record of those proceedings. If you or your members wish to supplement the record or to respond to statements made during the workshop, please encourage them to submit a public comment on any of the workshop topics. The comment period remains open through April 30, 2015.

Sincerely,

Marina Lao
Director, Office of Policy Planning
Federal Trade Commission

Robert Potter
Chief, Legal Policy Section
U.S. Department of Justice
Antitrust Division

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